No. 423.

Brf. of Garland & Garland for Appts.

Filed Dec. 10, 1898.

Supreme Court of the United States.

October Term, 1898.

WILLIAM STEPHENS et al.

vs.

CHEROKEE NATION.

No. 423.

APPEAL FROM THE INDIAN TERRITORIAL UNITED STATES COURT.

A. H. GARLAND,
R. C. GARLAND,
Attorneys for Appellants.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM STEPHENS *et al.*
vs.
CHEROKEE NATION.
No. 423.

Appeal from the Indian Territorial United States Court.

Come the appellants and state and show to the court that the case involves the question of citizenship of certain parties in the Cherokee Tribe of Indians, and the right of appeal from the Territorial court to this court is given by the Act of Congress, approved July 1, 1898, called "The Indian Appropriation Bill for the fiscal year ending June 30, 1898," (Public Act No. 175); and such act, among other things, provides, as follows:

> "In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible"—

Wherefore, they move the court to advance said cause for hearing at as early a day at the present term as the convenience of the court may permit.

A. H. GARLAND,
R. C. GARLAND,
Attorneys for Appellants.

And counsel for the appellants state and show that precisely the same general questions involved in No. 423 are involved also in—

Nos. 460, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 553, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 592, 593, 598, 599, 600, 601, 608, 609, 612, 613, 614, 615, 616, 617, 618, 619, and that the attorneys for appellants in this case are the attorneys for each and all of the parties in the above designated numbers, and they now move for a similar order of advancement of those cases to be heard along with No. 423; and they append herewith a list of the cases above indicated by number.

A. H. GARLAND,
R. GARLAND,
For Appellants.

Docket of citizenship cases for A. H. and R. C. Garland.

Mary E. Truitt *et al.* *vs.* Cherokee Nation.	No. 460. Indian Territory United States Court.
Juletta Jordan *et al.* *vs.* Cherokee Nation.	No. 464. Indian Territory United States Court.
Caleb W. Hubbard *et al.* *vs.* Cherokee Nation.	No. 539. Indian Territory United States Court.
Delphian McAnally *et al.* *vs.* Cherokee Nation.	No. 540. Indian Territory United States Court.
Mary L. Brashear *et al.* *vs.* Cherokee Nation.	No. 541. Indian Territory United States Court.
S. K. Coudry *et al.* *vs.* Cherokee Nation.	No. 542. Indian Territory United States Court.
Mariam A. Dial *et al.* *vs.* Cherokee Nation.	No. 543. Indian Territory United States Court.
W. P. Munson *et al.* *vs.* Cherokee Nation.	No. 544. Indian Territory United States Court.
George Hubbard *et al.* *vs.* Cherokee Nation.	No. 545. Indian Territory United States Court.

Louisa E. Trotter *et al.* *vs.* Cherokee Nation.	No. 546. Indian Territory United States Court.
Samuel C. Hill *et al.* *vs.* Cherokee Nation.	No. 547. Indian Territory United States Court.
P. G. Russell *et al.* *vs.* Cherokee Nation.	No. 548. Indian Territory United States Court.
Mary E. Baird *et al.* *vs.* Cherokee Nation.	No. 549. Indian Territory United States Court.
Mozart Binns *et al.* *vs.* Cherokee Nation.	No. 550. Indian Territory United States Court.
Catherine V. Smith *et al.* *vs.* Cherokee Nation.	No. 551. Indian Territory United States Court.
Thomas Henley *et al.* *vs.* Cherokee Nation.	No. 552. Indian Territory United States Court.
Hezekiah Henley *et al.* *vs.* Cherokee Nation.	No. 553. Indian Territory United States Court.
William M. McGee *et al.* *vs.* Cherokee Nation.	No. 554. Indian Territory United States Court.
Mary A. Singleton *et al.* *vs.* Cherokee Nation.	No. 555. Indian Territory United States Court.
Elizabeth A. Brown *et al.* *vs.* Cherokee Nation.	No. 556. Indian Territory United States Court.

Hannah Flippin *et al.* *vs.* Cherokee Nation.	No. 557. Indian Territory United States Court.
J. M. Gambill *et al.* *vs.* Cherokee Nation.	No. 558. Indian Territory United States Court.
Mary F. Brewer *et al.* *vs.* Cherokee Nation.	No. 559. Indian Territory United States Court.
Joseph M. Abercrombie *et al.* *vs.* Cherokee Nation.	No. 560. Indian Territory United States Court.
William J. Watts *et al.* *vs.* Cherokee Nation.	No. 561. Indian Territory United States Court.
Agnes D. Hockett *et al.* *vs.* Cherokee Nation.	No. 562. Indian Territory United States Court.
Elizabeth Pace *et al.* *vs.* Cherokee Nation.	No. 563. Indian Territory United States Court.
George Teague *et al.* *vs.* Cherokee Nation.	No. 564. Indian Territory United States Court.
B. F. Earp *et al.* *vs.* Cherokee Nation.	No. 565. Indian Territory United States Court.
Eliza Mayberry *et al.* *vs.* Cherokee Nation.	No. 566. Indian Territory United States Court.
David Bailes *et al.* *vs.* Cherokee Nation.	No. 567. Indian Territory United States Court.

John G. Lloyd *et al.* *vs.* Cherokee Nation.	No. 568. Indian Territory United States Court.
A. W. Rutherford *et al.* *vs.* Cherokee Nation.	No. 569. Indian Territory United States Court.
Cynthia A. Braught *et al.* *vs.* Cherokee Nation.	No. 570. Indian Territory United States Court.
Eliza M. Black *et al.* *vs.* Cherokee Nation.	No. 571. Indian Territory United States Court.
A. M. and Fannie Archer *vs.* Cherokee Nation.	No. 572. Indian Territory United States Court.
George D. Hopper *et al.* *vs.* Cherokee Nation.	No. 573. Indian Territory United States Court.
David C. Bayes *et al.* *vs.* Cherokee Nation.	No. 574. Indian Territory United States Court.
W. J. Rowell *et al.* *vs.* Cherokee Nation.	No. 575. Indian Territory United States Court.
Valinda Armstrong *et al.* *vs.* Cherokee Nation.	No. 576. Indian Territory United States Court.
Cynthia Gain *et al.* *vs.* Cherokee Nation.	No. 577. Indian Territory United States Court.
Susan S. Bennight *et al.* *vs.* Cherokee Nation.	No. 578. Indian Territory United States Court.

David Meredith *et al.* *vs.* Cherokee Nation.	No. 592. Indian Territory United States Court.
Sallie Poindexter *et al.* *vs.* Cherokee Nation.	No. 593. Indian Territory United States Court.
Chris. C. Steen *et al.* *vs.* Cherokee Nation.	No. 598. Indian Territory United States Court.
H. M. Couch *et al.* *vs.* Cherokee Nation.	No. 599. Indian Territory United States Court.
B. A. Presbey *et al.* *vs.* Cherokee Nation.	No. 600. Indian Territory United States Court.
John W. Elliott *et al.* *vs.* Cherokee Nation.	No. 601. Indian Territory United States Court.
Rebecca M. Walker *et al.* *vs.* Cherokee Nation.	No. 608. Indian Territory United States Court.
James H. Harrison *et al.* *vs.* Cherokee Nation.	No. 609. Indian Territory United States Court.
James B. Watts *et al.* *vs.* Cherokee Nation.	No. 612. Indian Territory United States Court.
James M. Hazlewood *et al.* *vs.* Cherokee Nation.	No. 613. Indian Territory United States Court.
David Frakes *et al.* *vs.* Cherokee Nation.	No. 614. Indian Territory United States Court.

Jefferson Harp *et al.* *vs.* Cherokee Nation.	No. 615. Indian Territory United States Court.
Francis Armstrong *et al.* *vs.* Cherokee Nation.	No. 616. Indian Territory United States Court.
Joseph W. Rogers *et al.* *vs.* Cherokee Nation.	No. 617. Indian Territory United States Court.
Robert Isbell *et al.* *vs.* Cherokee Nation.	No. 618. Indian Territory United States Court.
Samuel Wiltenberger *et al.* *vs.* Cherokee Nation.	No. 619. Indian Territory United States Court.

No. 423.

Brf. of Garland, for Appellants

Filed Feb. 11, 1899.

IN THE

Supreme Court of the United States.

October Term, 1898.

WILLIAM STEPHENS et al.

vs.

THE CHEROKEE NATION.

No. 423.

Appeal from the Indian Territorial United States Court.

BRIEF FOR APPELLANTS.

A. H. GARLAND,
R. C. GARLAND,
H. J. MAY,
Attorneys for Appellants.

M. M. EDMISTON,
of Counsel.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM STEPHENS *et al.*
vs.
THE CHEROKEE NATION. } No. 423.

Appeal from the Indian Territorial United States Court.

Brief for Appellants.

This case involves the question of citizenship of certain parties in the Cherokee Tribe of Indians, and the right of appeal from the Territorial court to this court is given by the Act of Congress, approved July 1, 1898, called "The Indian Appropriation Bill for the fiscal year ending June 30, 1898" (Public Act No. 175); and such act, among other things, provides, as follows:

"In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases onthe docket and dispose of the same as early as possible."

There was much opposition by the delegates of the Cherokee Nation to the granting by Congress of the right of appeal to this court. The point of objection by them was, the act of June 10th, 1896, made the decision on appeal from the Dawes Commission (so called) final, and the matter was closed and could not be opened again; and some reliance was placed upon an act of Congress, of March 3, 1893, ratifying the *strip agreement*, as it is called, and some treaty stipulations are invoked against the giving this right of appeal.

We are not advised as to this matter, but we presume the same objection will be raised here. Congress granted the right of appeal, notwithstanding the protest of the delegates. This protest was based on the act of March 3, 1893, and the act of June 10th, 1896, and is, for the purposes of this argument, as follows:

"First. That all persons now resident or who may hereafter become residents in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or act of Congress, shall be deemed and held to be intruders and unauthorized persons, within the intent and meaning of Section 6 of the treaty of 1835 and Sections 26 and 27 of the treaty of July 19th, 1866, and shall, together with all their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon demand of the Principal Chief of the Cherokee Nation."

And the act of Congress of June 10, 1896, which reads as follows:

"That said commisson is further authorized and directed to proceed at once and hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such commission within three months after the passage of this act.

"The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said roll as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any person who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatever heretofore taken where the witnesses giving such testimony are dead or now residing beyond the limits of said Territory, and to use all fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the

true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

To this protest of the Cherokee Delegation, those asking for the right of appeal to this court presented a reply to the Congress of the United States; and looking over this reply again, we believe it contains all that is necessary to be said in this connection, and we present it as a part of this brief:

" *To the Senate and House of*
Representatives of the Congress of the United States:

The petition of the " *Cherokee Delegation* " to strike out of H. R. 6896 Senate amendment allowing appeals to the Supreme Court of the United States in certain cases of citizenship deserves some special notice at the hands of those desiring such appeals, and leave is here asked most respectfully to present this reply thereto, and the hope is indulged that Congress will give it close attention.

The position of the petition as to granting this right being opposed to certain treaties is of no avail, as all of this legislation, from the creation of the *Dawes Commission*, so-called, to the last act on the subject, is over and above all treaties, and rests upon the broad and plenary jurisdiction of Congress in all Indian matters since we abolished the making of treaties with those people in 1871. That this jurisdiction exists to the fullest extent

is now one of the firmly and indisputably settled principles in our law, by various decisions of the Supreme Court of the United States, and by as many or more acts of Congress. The *Kagama case* (118 U. S., 375) settled this most explicitly, and this case has been followed and affirmed by several others since.

And so the Strip agreement of March 3, 1893, stands in the same category, and Congress has legislated in the face of it, from time to time, as the several acts on this subject most amply attest; and all this legislation must be set aside if this point of the "*Cherokee Delegation*" is of any value.

The assertion on page four of the petition as to the organized band of *intruders* and *their leader*, and the *base intention*, &c., is a bare-faced assertion, and if true has nothing earthly to do with the right here claimed. If this right is one in law, or entitled to be such, it can not be bargained away thus, and it is purely an assumption without proof, for if the report of the *Dawes Commission*, so-called, to the Secretary of the Interior November 18, 1895, is to be believed (see report of the Secretary of the Interior to Congress December, 1895, pp. 91–'2 *et seq.*) such a thing as an *intruder* in this connection does not exist; and we very respectfully ask Congress to examine that report and see how anxious it appeared to be to protect those people who are so recklessly and falsely charged as being *intruders*.

And on page 6 of the petition we are informed the "*Cherokee Delegation*" *and Nation* are well pleased with the decisions as they are. Doubtless, truly; yea, verily!

But there are other parties interested and on the record who are not so well pleased and satisfied. The "*Cherokee Nation*" is not alone concerned here. We will see after a while who else, what other parties, are directly and vitally interested and concerned, and how they will stand if these decisions are not reviewed.

Against the general proposition that a judgment or decree on a matter judicially before a court can not be opened, but is settled, is an adjudicated thing, we make no war. But the trouble is, these decisions are not final, they are all still *in fieri* before Congress for its action; and upon this broad jurisdiction of Congress over the whole subject of Indian matters and affairs, it may refuse the whole of this work, or a part of it, or it may take its own course and adopt a new scheme and method entirely. Then the work is before Congress for its action as it sees fit. When Congress looks into it, the first thing it finds is, staring it in the face, three different decisions at least, in the Indian country, holding different and actually antagonistic views. Now, which is final? If they are all final it is apparent the grossest injustice is to be done to many people in that country. The opinions of Judges Springer, Clayton and Townsend disagree widely, and they can not all be right. Are we to deal with a class of people in the Choctaw Nation one way and with a like class in the Chickasaw and Cherokee Nations in another? The thing is ridiculous and absurd. The sagacious Secretary of the Interior, in his report to Congress last December, said wisely, he wanted no plan or method of disposing of the many complicated

Indian questions that was not the same to all the tribes, as far as could be. And here we are asked to disregard this safe suggestion, and leave whole masses of people to be dealt with under these opposing, conflicting, and warring judicial interpretations. With all due respect, Congress owes it to itself, to these people all, and to the whole country to provide means to unsphinx this riddle, and have a uniform method of disposing of these all-important questions. Judge Springer's *finality* is as good as that of Judge Clayton, and that of Judge Townsend is as good as the *finality* of either. Now, then, in adjusting the whole matter, as this bill under consideration seeks to do, whose *finality* will Congress adopt? It can not, with propriety and decorum, adopt them all, and it might be offensive to the high judicial functionaries who passed upon these cases, to say no more, to make an invidious distinction in adopting one to the exclusion of the others. If these are all to be final, then Congress, instead of adjusting and settling matters in that country, leaves it in confusion worse confounded and in disorder bordering on chaos.

In the history of Congressional legislation organizing commissions to pass upon and decide disputes, or in giving the jurisdiction to do so to existing tribunals, how often have we seen Congress, by acts supplemental, giving the right to review when the original act made the findings of those commissions or tribunals final? The instances are many, and in the nature of things it must be so. We will cite one notable case, which goes even a bow-shot or two beyond what we ask here, and that case

will be conclusive, we take it, as the question made by the petition is on the power of Congress to open up these decisions of the District Courts, after the law said they should be final. Here, then, is the sole question—one of power of Congress to do this!

Sampeyreac & Stewart v. *The United States* (7 Peters, 222) came up on an act of Congress of 26th May, 1824, to settle claims of parties to lands in Missouri and Arkansas, within a certain specified time, and under this act *Sampeyreac* filed his petition, and after full proceedings had, he obtained a decree confirming his claim. Appeal was provided for in the act of 1824, to be taken within one year after judgment, and if no appeal should be taken within that time, the judgment should be *final* and *conclusive.*

In this case more than a year elapsed and no appeal was taken, and in 1830, after the time had passed for an appeal, Congress passed an act allowing bills of review to be filed in any or all of these cases, and extended the time in which to do this. Under this act of 1830, the United States filed a bill of review, and the Superior Court of Arkansas sustained the bill of review, and on the hearing set aside its former decree and rendered one in favor of the United States, and *Sampeyreac & Stewart* appealed, and the Supreme Court of the United States affirmed that decree of the Superior Court of Arkansas on the bill of review. The very identical question was raised in that case as is here, viz: "The act of 1830 was unconstitutional, as a right had become vested in *Stewart* before the act was passed, and the effect and operation

of the law was to deprive him (Stewart) of a vested right." Here the "*Cherokee Delegation*" contend the granting of this appeal will deprive their Nation of a vested right! The court held the act of 1830, providing only a remedy, was unexceptionable; that the retrospective operation of such a law forms no objection to it; that almost any law providing a remedy affects and operates upon causes of action existing at the time the law is passed. (P. 237.)

All there is of it here is, these decisions are final with respect to the remedy given under the original act, but now we ask for a new and additional remedy, which Congress is competent to give. There is no such thing known in the law as a vested right to a particular remedy. Surely there can be nothing left of this objection when Congress can grant reviews long after the decision is *final and conclusive* under the original act giving a remedy at all. Certainly this case tears to pieces and throws to the winds the objection that Congress can not give and provide here a still further remedy to pursue what these people claim. More citation of authorities would be useless.

And it is respectfully submitted that Congress has this power, unlimited and unrestricted; and it is its duty to exercise it now, to relieve, for all time, against a strange, singular, and unjust condition of affairs in that country, where Congress must see that justice is done.

And these are dear and close questions to the people interested, and, in fact, of great importance to us all—worthy, in all respects, of the full consideration and unbiassed judgment of the highest court of the land, and

no one of us should dread or fear a submission of them to that tribunal.

Very respectfully,

A. H. GARLAND and
R. C. GARLAND,
Attorneys for Watts, Hubbard and others asking appeals."

"APRIL 15, 1898."

Some question has been made as to the power of Congress to authorize appeals from the Dawes Commission to the United States courts in the Indian Territory as appeals can not be prosecuted to a court from a mere commission. This has been touched upon in the brief before Congress above submitted. But we think it is set at rest by this court, in *The U. S.* v. *Ritchie*, 17 How., 525; and more is not needed on this point.

Another question, that Congress could not legislate on the subject of citizenship among these tribes, but it is a matter entirely for the local authorities there to dispose of under local laws and customs. The almost unlimited control and management by Congress of the Indian affairs, since 1871, when we ceased to make treaties with them, disposes of this objection. We refer in support of this view to the case of *Kagama* (supra), which has been followed and reaffirmed by this court several times since.

But in this particular inquiry, as to the Cherokees, all difficulty, if any existed, is removed by the very first treaty ever made by these people with the United States, dated November 22d, 1785. Article 3 of that treaty ex-

pressly provides "That said Indians, for themselves and for their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever;" and article 9 of the treaty provides "For the benefit and comfort of the Indians and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such a manner as they (the United States in Congress assembled) think proper." (See vol., Revision of Indian Treaties, p. 27), and therein cited towards the close of Judge Springer's opinion. These provisions have never been repealed or abrogated, and they are certainly broad enough to sustain the legislation by Congress in respect to the settling of this citizenship question.

What, then, did Congress do, or attempt to do, in dealing with this matter of settling the right of citizenship in these tribes? In searching for the meaning of legislation of this character, the history of the times, and the surroundings generally, when the legislation is had, furnish the best means for solving the question.

United States *v.* Union P. R. R. Co., 91 U. S., 72.
Aldridge *v.* Williams, 3 How., 9.
Dist. Columbia *v.* Washington, &c., 103 U. S., 243.
Endlich Int., secs. 20–23, 26–29, 30–31.

But of this exposition from and by the light of the times, the statements and speeches of the legislators form no part—they can not be resorted to for the purpose of interpreting and constructing the statute.

The presentation of the laws, customs, and usages of the Nation as to enrollment for many years previous to the creation of the so-called Dawes Commission is fairly stated, in their chief elements, by the brief of the Nation and in the opinion of Judge Springer, and we will not quarrel with that, and will merely remark the court will observe that in the Nation's legislation and the rules promulgated thereunder, constantly occur in this connection BLOOD and DESCENT. These are not meaningless or empty words, they cannot be read out of the procedure to subserve any ends. They are potent and strong words, and are as much entitled to their place in these laws and rules as any words contained in them, and after a while we will see just how they are operative and how they contributed to bring about the present legislation by Congress. It is quite interesting and no less instructive. We find that long previous to, and at, the time the so-called Dawes Commission, with trembling limbs, entered into the Indian country, under its powers given by Congress, the ROLL was all-powerful and paramount, and by it alone stood the citizenship in the Nation. But when this commission came and began to look into and uncover these and other matters there, they were abashed, turned pale and almost sickened. In their report, November 18, 1895, to the Secretary of the Interior, they inveighed against it in no measured terms, and denounced it in language that almost made the current of blood run backwards. "Political football," "glaring instances," "miscarriage of prosecutions," "surprising and shocking," "disregard of the plainest

principles of law," "grossest injustice proved," "consummation of a great wrong," "to deprive them of the houses and property acquired," are a few of the inspiriting and savory words employed by such commission to name and define this matter of the ROLL. (See the report of the Secretary of the Interior to Congress, December, 1895, 90–93.) And the commission fervently invoked Congress to bring a halt, and prevent the huge wrong contemplated by this kind of enrollment! This report is full of healthful and tonic reading, and is commended for its sincerity, fairness, and truthfulness. It is needless to quote from it further, as it is a public document, and must be judicially known to this court. It is, then, plain, perfectly so; such commission was disgusted with the ROLL business, from the very bottom of their souls, and they called aloud for corrective legislation. This was submitted to Congress at its meeting in December, 1895. Here, now, a mischief, screaming and howling mischief, was pointed out, and a remedy was asked and implored. All this that was arraigned had been done under the *laws*, *customs*, and *usages* of the Nation as asserted by counsel for the Nation in argument below. But all this was an abuse of the grossest character, and Congress, so recognizing, undertook to correct it. Did Congress ratify and approve this mode of proceeding? By no means. If Congress had, it would have said so in just so many words, and it had all the English language to select from to say so. But, instead of that, recognizing the burning mischief so vehemently and eloquently pointed out by the commis-

sion, enacted a statute, nearly a full page in length. (Stats., 1st sess., 54th Cong., page 339, June 10, 1896.)

What did that statute do or seek to do? It empowered this commission to hear the applications of ALL PERSONS. Hear and determine legally means more than to examine a ROLL and adopt it. In determining these matters the commission was to respect the laws, customs, &c., of the Nation, when it could be done consistently with the laws and treaties of the United States. Of course they were to respect those laws and customs, where it could be done safely to the end sought, and in the same manner due force and effect were to be given the ROLLS—but all this had to be done in pursuance of the policy of correcting a most shameful proceeding that was there, in black and white, before Congress. It was simply this, and no more—"You must take the ROLL as far as it goes as correct; you will not examine into the right of anyone already there—you will not knock off anybody." This is plain! Then what else? "You will see if there are any others not on there who ought to be:—consider, or *hear* and *determine* applications to get on that ROLL"—this, taken in connection with the whole history of the matter, makes the statute plain and reasonable. After all this investigation and report, and work and labor, that Congress undertook simply to have the ROLL confirmed is not tenable—it is folly to talk about it. Two and a half lines of a statute would have sufficed for this. In other words, it is claimed that Congress directed this commission to receive and confirm what they had, only five months be-

fore, condemned in most explicit and unmistakable language! Impossible.

But further, in order to give the commission full power to do this, they are directly authorized to send for persons and papers, administer oaths, take depositions, and examine witnesses, providing for the use of testimony of persons deceased, to use every fair and reasonable means within their reach for the purpose of determining the rights of applicants for citizenship. All this was wholly unnecessary, if the commission had only to examine the ROLLS and put them in shape and adopt them. An appeal from such a decision would be valueless; there would be nothing to appeal from. Why this great power—a judicial power—to swear witnesses, take testimony, &c., if they had simply to see if the applicant's ancestor was on the ROLL! The commission had already said the ROLL was a "football political," made and unmade as a child does its little cob house. If people were refused such ROLLS, or were struck off so fraudulently, as the commission asserted, were they not empowered to enquire into all this? If one's ancestor had been stricken out so outrageously as the commission claimed, could they not examine this and let in the applicant through the blood of that ancestor? It is impossible to tell what they were for, if they could not do this. This was to remedy the evils complained of, and to give these people rights they were entitled to, and would have secured if these indecent and unblushing frauds, as set forth by the commission, had not been perpetrated.

BLOOD and DESCENT run through the laws and regulations of the Nation, as we have seen. Yet, in flagrant violation of all this, as the Dawes Commission emphatically remarks, the Chief of the Nation observed them or not as he pleased. We have it by report of the Dawes Commission, many of these people came on the invitation of the Nation, in order to get their blood together at one home, and they settled there and raised families and became good citizens with that view. Yet the same report says, they were refused admission to the ROLL, or put on in some instances and taken off without hearing and without notice. To correct these, the Dawes Commission was empowered to look into and pass upon these matters as a court. It was their report that brought forth this law, and upon the laws and facts touching the race, blood, and other things this question must be heard and determined. A person says generally he is rightfully entitled to be a citizen of the Cherokee Nation. Does not this carry with it, in the first impression, his blood is of that tribe of people, and he is a descendant of a Cherokee or of Cherokees? If a Mongolian comes and says he is of right a Cherokee citizen, the thing is laughable, or if an African does. But if one says his blood is Cherokee and therefore he is entitled to be a citizen, this we understand, and the inquiry begins. The whole idea, in the first instance, must be predicated upon the blood. And it was to go—all their race in and under one fold when the Cherokees called for the outsiders, as they termed them, to come in. And the kind and manly interposition of the so-

called Dawes Commission was to protect people of the tribe—people of the blood—people descended from the old Cherokees of the woods; and to protect them under this powerful appeal of this high tribunal, Congress enacted this law—that is the plain, unvarnished, and direct history of the matter. And no legal legerdemain can avoid it—no overriding desire to beat the tribes out of their existence can escape it—and no ugly names applied, such as Intruders, can blink or wink it away. The masterly report of the so-called Dawes Commission repels and overturns most completely the idea of Intruders, and shows it as misapplied as to those affairs here discussed. The court will bear in mind, this is a remedial statute—passed to remedy evils, according to the report of the so-called Dawes Commission, that cried aloud to Heaven and smelled badly in the nostrils of all decent people. Courts favor remedial statutes and construe them most liberally to bring about the remedy.

Endlich Sup., 107-110 and 112, and notes.

So regardful are the courts of this view as to remedial statutes, they have held the words "single man" to embrace an unmarried woman:

Silver *v.* Ladd, 7 Wall., 219.

And the rule, acquisition of citizenship by descent or extraction, is a natural law, one which governs all mankind all the world over.

Webster on Citizenship, p. 109.

Congress, looking to getting the tribal relations of

these people extinguished, concluded it must first be known and made to appear who were Cherokees—of the race of Cherokees—of the blood of Cherokees—before all this and other things could be done, looking to the final disposition of those tribes—tribes of certain blood, tribes of certain races. And this inquiry was one of the steps to do it. Congress took hold of this whole matter in earnest, and by this act legislated upon the entire subject, wiping out and setting aside all previous acts of any legislature or body inconsistent with it (The United States *v.* Tyner, 11 Wall., 88); and this act provides the full measure of relief in these affairs. And we ask Cherokees, absolute and actual and real Cherokees by blood, be placed on these ROLLS; that the ROLLS heretofore made, being, as the commission say, partial, unjust, and almost disreputable, be corrected and supplied by adding as pure and good Cherokee blood to them as can be found on them anywhere. Only this and nothing else. And the decision of the Dawes Commission failing to do this is grossly erroneous and wrong, and so is the judgment of Judge Springer affirming that decision, as were the ROLLS heretofore so loudly and unsparingly denounced by the commission in their report of 1895; and those decisions, as Old Lord Chief Justice Wilmot used to say, "should be reversed with indignation."

The opinion of Judge Springer, in construing the question of *Blood and Descent* v. *Enrollment*, is appended hereto in full, that the court may see all there is of the question on both sides, so far as this general proposition goes. The opinion goes back to the Pleistocene if not to

the Azoic age, and it is not wanting in length, but it is only proper it be given in full.

It is not difficult to bring the present case within the rules of law which we contend should prevail, and we now call the attention of the court briefly to the material facts in the record.

The case was tried before the Dawes Commission on the issues framed by petition of the applicants and a demurrer and answer combined thereto by the Nation, and judgment was rendered against the applicants.

The demurrer and answer (Rec., 20, 21) to the petition are as follows:

"Your respondent, S. H. Mayes, principal chief of the Cherokee Nation, comes now and demurs to the said application, and for the grounds thereof says:

1st. That this commission has not jurisdiction over the parties or subject-matter of this controversy and no legal right, therefore, to hear and determine the same.

2nd. That the application does not state facts sufficient, if true, to show that the applicants are entitled to citizenship.

Respondent, not waiving his aforesaid demurrer, but insisting upon the same, for answer to said application says that William Shoe Boots, through whom the petitioners claim to derive their right to citizenship in the Cherokee Nation, is not now and has not been a citizen of the Cherokee Nation since the removal of said Nation west to the Indian Territory, as at present located and defined; that the name of William Shoe Boots does—appear on the authenticated rolls of 1857 of said Nation; that neither they nor any of their ancestors now reside or ever have resided in the Cherokee Nation and Indian Territory as citizens thereof.

Respondent, for a further and complete defense to the aforesaid application, says that heretofore said applicant was made before a legally constituted court or commis-

sion on citizenship having jurisdiction over applicants for readmission to citizenship in the Cherokee Nation; that the said case was tried upon its merits; that upon a final hearing judgment was duly given against the applicant and in favor of this Nation. A duly certified transcript of the aforesaid proceedings and judgment *are* annexed hereto and made a part of this answer. Some of said proceedings, having been filed with the respondent's petition, are not included. Respondent further alleges that the case of William Shoe Boots was tried at the same time, a negro deriving his rights through the same ancestor, as shown by the decision of the commission. The depositions, affidavits of witnesses, all of whom are now dead, are also attached hereto, together with other testimony.

Having fully answered, your respondent asks to be hence dismissed."

The case being appealed from the Dawes Commission to the Indian Territorial court, that court tried it *de novo*, first referring it to a special master for report on all the facts, and the special master made quite an elaborate report (Rec., 39–47), in which he found, after reviewing all the testimony he had taken, in substance, as follows:

"Reviewing all of the above evidence, I am forced to the conclusion that the old Capt. Shoe Boots, Teaskiyarga, was a full-blood Cherokee Indian; that he married a full-blood white woman by the name of Clarinda Ellington, and there were born to them three children as the issue of said marriage, two sons and one daughter, one of his sons being William Ellington Shoeboots, who afterwards adopted his mother's maiden name, William Ellington. One of the witnesses thinks the daughter's name was Annie, but others say her name was Sarah. The other son was named John Shoe Boots. The daughter Sarah or Annie was the mother of the appellant William Stephens, and was a half-blood Cherokee Indian.

I find from the sworn petition that it is the history of the Shoe Boots family that Captain Shoe Boots, Teaskiyarga, captured his wife in Kentucky and carried her to Georgia, and she was a white girl named Clarinda Ellington, and, as above stated, there were born to them three children. The relatives of Clarinda Ellington, upon learning of her whereabouts, went to old Shoe Boots, and, upon a promise to return them, prevailed upon him to permit his wife, Clarinda, and her children to visit her relatives and the home of her childhood in Kentucky. They never returned to their husband and father. Sarah afterwards moved to the State of Ohio and married Robert Stephens, a white man, and there was born to them this applicant, William Stephens. William Stephens came to this country over a quarter of a century ago, where he has continuously resided in the Cherokee Nation. He came here under an invitation issued by Chief Downing for all non-resident Cherokees to come to the Cherokee Nation and make it their home. Soon after he came he made application for his mother and for himself to be readmitted as citizens of the Nation. The commission who heard this case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application upon a technical ground. Upon this report Chief Mayes, on a message to the general council, stated his confidence in the honesty and genuineness of the claim of the applicant and wanted the council to pass an act recognizing applicant as a full citizen, but somehow this was never done.

I find, as above stated, that William Stephens came here over twenty-five years ago, and has in good faith sought to become a citizen of the Cherokee Nation, relying solely upon the justness of his cause and his unquestioned Cherokee blood to readmit him as a citizen. He has improved a considerable property in the Cherokee Nation, and has continuously lived here as a Cherokee citizen, and at one time was permitted to vote in the Cherokee elections.

The Cherokee Nation does not deny the fact that the appellant, William Stephens, has Cherokee blood, but contends that the mother of the said Stephens was of

African or negro blood, and by reason of this fact should not be admitted to citizenship.

I do not think it necessary to comment upon this as a legal question in the case, but I am convinced from a great preponderance of the evidence that the mother of Stephens had not a drop of negro blood in her veins; but, to the contrary, she was one-half white and one-half Cherokee, as claimed by the appellant, Stephens, thus making Stephens a quarter Cherokee Indian and three-quarters white.

I find that Mrs. Mattie J. Ayers is a daughter of William Stephens, thus making her one-eighth Cherokee Indian and seven-eighths white, and there was born to the said Mattie J. Ayers in lawful wedlock the following living children: Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers.

I therefore conclude that William Stephens and his daughter, Mattie J. Ayers, and her children, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, are all Cherokee Indians by blood, and untainted with any negro or African blood."

The court below in passing upon this report took no issue with any fact in it, but conceded it clearly set forth all the facts in the case. (Rec. 50.) After briefly stating some of the testimony and indulging in a few remarks thereon, the court thus concludes:

"*The evidence fails to disclose that he* [*the ancestor*] *has ever applied to any of the commissions that had jurisdiction to admit him as a citizen of the Cherokee Nation. The commission to which he did apply for enrollment as a citizen of the Cherokee Nation having held that as his name did not appear upon any of the Cherokee rolls of citizenship, his appllcation was rejected. He never having been admitted to citizenship as required by the constitution and laws of the Cherokee Nation, the judgment of the United States commission rejecting this case is confirmed, and the application of the claimants to be enrolled as citizens of the Cherokee Nation is denied.*" (Rec. 51-2.)

The BLOOD and DESCENT of these applicants (appellants) are established as clearly as can be, and the proof of residence and the possession of improvements upon property in the Nation is also as clearly shown; and that Wm. Stephens, the ancestor in this application came into the Nation under the invitation of Chief Downing, over twenty-five years ago, *for are all non-resident Cherokees to come to the Cherokee Nation and make it their home;* that he had been denied his application for citizenship on *mere technical grounds,* although the commission applied to was convinced of the genuineness of his claim to Cherokee blood. (Master's Rep., *supra.*) The call upon these people to come within the Cherokee fold, we take it, was sincere, and it was done evidently with the view of collecting together, as far as may be, the entire Cherokee blood, and this end, we submit, was not to be defeated or thwarted by any mere technical methods. No more thoroughly recognized and understood principle of law exists than when a person does all he can to secure his rights, the neglect or refusal of officials to do their duty in the premises will not prejudice him.

Lythe *v.* The State, 9 How., 333.

But aside from this, Congress, by act of June 10, 1896, in view of all these complications and embarassments surrounding this question in the Nation, said, after being urged so to do by the Dawes Commission (see Report, *supra*), we will take charge of this whole subject, and establish a rule by which all these applicants,

or those desiring citizenship, may be heard, regardless of formalities before a proper tribunal, and while the rolls as they now exist, as to persons already on them, there will be no disturbance, yet all who think they should be there by virtue of *blood and descent* will be heard, and their claims fully and fairly adjudicated. As we have seen, this is the undoubted meaning of the statute. So when the court below denies admission because the ancestor was never admitted by the local authorities, it begs the question entirely. If he had been admitted, it is safe to say, this application would not have been made. It is because he was not admitted this application is made. Congress did not disturb the enrollment of persons already made, but in view of the fierce denunciation by the Dawes Commission, of trifling with claimants and denying many of them citizenship, it allowed those of that class to come forward anew and produce testimony of all sorts, and have their claims *heard and determined.* If the act of Congress did not mean this, it was entirely unnecessary and superfluous. What! the high commission, aided by Congress, composed of ex-United States Senators and ex-members of Congress, given authority merely to see if certain rolls contain the names of A, B, C, &c., and if so, all right, they are citizens; and if not, then they are not citizens, and must not be. The proposition is a ponderous one. If this were all, a fair business chap in a mercantile establishment or pawnshop or any president of a well-organized football team out there could have done this just as well as the distinguished men to whom Congress did confide the whole matter. Oh, no;

Congress gave them great judicial power—to coerce witnesses, to take testimony of all kinds needful, and to *hear and determine*, in short, whether certain persons who are not on those rolls should not be there.

And the Act of Congress of June 7, 1897 (Ind. Appropriation Act, 1st Sess., 55th Cong., title, Miscellaneous, p. 84), amendatory of the act of 10th of June, 1896, confirms to the letter the view we here take in defining the word *rolls* of citizenship as used in the act of June, 1896—that is, the last authenticated rolls of each tribe which have been approved by the council of the Nation, and the *descendants* of those appearing on such rolls, and such additional names and their *descendants* as have been subsequently added, either by the council of such Nation, the duly-authorized courts thereof, or the commission under the act of June 10, 1896; and all other names appearing upon such rolls shall be open to investigation by such commission for a period, etc., etc. This provided what sort of rolls already made should stand, and what names appearing there in certain shapes should be stricken off. But this amendatory act said nowhere there should be no names of Cherokees by *blood and descent* should be added to the rolls—by no means; indeed, as we have seen, the chief object of the whole remedial act was to allow persons, who were not on the rolls for the one or the other reason, an opportunity to show they ought to be there, and to be put there if they showed they were entitled to citizenship.

Some of the numerous cases before this court turn upon the question of being stricken from the rolls after

admission thereto, but this is not one of them; this, as we have seen, stands on different grounds.

Claimants here show their right by blood and descent, conjoined with residence, improvements, and property generally, and it is submitted they come within the meaning and intention of the act of Congress.

And we repeat here the assignment of errors in the record (Rec., 52): The court erred in not admitting the parties to citizenship, in refusing them citizenship; the court, finding the parties were Indians, should have directed their enrollment.

And it is respectfully submitted the construction by the court below of the act of Congress was narrow and constipated, and its decree should be reversed and direction given to enter a decree ordering the enrollment of these parties.

A. H. GARLAND,
R. C. GARLAND,
H. J. MAY,
For Appellants.

APPENDIX.

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF THE INDIAN TERRITORY, SITTING AT MUSKOGEE.

In the matter of the application of certain persons to be enrolled as citizens of the Cherokee Nation.

Opinion of William M. Springer, Judge.

Jurisdiction of the Court.

The subject of citizenship in the Cherokee Nation has occupied a large share of public attention in that Nation during the past twenty-six years. It has been the cause of numerous acts of legislation by the Nation and by Congress, and also has entered largely into the administration of the Interior Department of the Government.

One of the learned counsel for claimants to citizenship in the Cherokee Nation refers, in the opening of his argument, to the importance of the subject, as follows:

"Of all the new questions and vexing problems that have come before and called for the judgment of this court, no one has been of such momentous consequence and so fraught with vexation as those this court must entertain and determine in the cases of claimants to Cherokee citizenship which are now pending." (G. B. Denison's Brief, p. 1.)

The number of persons interested in cases now pending before this court on appeal from the United States commission is believed to be in excess of 5,000, and that about 4,000 of these persons are applicants for citizenship in the Cherokee Nation. The property rights involved

will aggregate many millions of dollars, to say nothing of the social and political conditions which are affected. This court approaches the subject with a conviction of inability to do justice to all who are concerned. No pains have been spared, however, for a thorough and exhaustive consideration of all the laws, decisions of the courts, and treaties which bear upon the question.

All persons whose interests are involved have had a fair and impartial hearing. The court is not responsible for the laws; it is only responsible for their application to pending cases. If injustice has been done to anyone, the court regrets it exceedingly. An honest purpose has actuated the court in all cases, and it asks that the consequences for any seeming injustice may be attributed, in part at least, to the law-making power, and not to the court, whose duty it is to construe and enforce the law as it may exist.

Congress has made the decision of this court final in these cases. It is possible that those who may be dissatisfied (and there will doubtless be many) will petition Congress for a reopening of their cases and for further judicial investigation and determination. To the granting of such petition this court can have no objection whatever. It only regrets that an appeal was not provided to a higher tribunal, in order that the responsibility could be divided, and that a greater concurrence of judicial authority might be procured.

This court submits to all concerned, and especially to the legal profession, the result of its deliberations in these cases, with a conscientious belief that the law has been justly interpreted and impartially applied in all cases, and that its judgments may be approved by all fair-minded men.

On the 10th day of June, 1896, the act making appropriations for the Indian Service for the year ending June 30, 1897, was passed. Prior thereto Congress had, by act approved March 3, 1893 (27 Stat. at L., 645), authorized the appointment of a commission to enter into negotiations with the five civilized tribes, known as the Cherokee, Choctaw, Chickasaw, Muskogee or Creek and the Seminole nations, for the purpose of extinguishment of tribal titles to the lands within the Indian

Territory. This act conferred no powers upon the commission except to negotiate and report. The act of June 10, 1896 (29 Stat. at L., 321), for the first time conferred upon the commission powers of an executive and quasi-judicial character, besides declaring a policy in regard to the government of the Indian Territory.

After making sundry appropriations for the Indian Service, the act of June 10, 1896, authorized the commission to the five civilized tribes to hear and determine the applications of persons who may apply to them for citizenship in any of said nations, and to make up the rolls of citizenship of the several tribes. As the provisions of this act not only define the powers and duties of the commission, but of this court, the text thereof, on this subject, is quoted at length, and is as follows:

"That said commission is further authorized and directed to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled:

"*Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act. The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.

"*And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizen-

ship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties, said commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said Nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

Provided, That if the tribe, or any person be aggrieved with the decisions of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court:

Provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

Those persons whose rights to citizenship has either been denied or not acted upon, and others mentioned in the first proviso above, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, with right of appeal to the United States court, as appears in the second proviso.

The provisions in the foregoing statute conferring jurisdiction upon this court are to the effect, that any persons aggrieved with the decision of the tribal authorities or the United States commission may appeal from such decision to the United States court, that the appeal shall be taken within sixty days from the decision of the tribal authorities or the commission, and that the judgment of this court shall be final.

There has been some contention as to whether the United States commission was such a judicial body as that appeals could be prosecuted from it to the United States court. It is not necessary to pass upon this question. Whether the cases which have been brought to

this court are technically on appeal, or whether they are instituted merely through the medium of the commission is immaterial; in either event this court may hear and determine them. By the rules of this court, heretofore adopted, each appellant or claimant has been practically accorded a trial *de novo*.

All the testimony that was considered by the United States commission is before the court. In addition thereto the privilege has been extended to all who have applied therefor to take additional testimony. Every claimant has been accorded the privilege of bringing before this court every fact which he may deem essential to the establishment of his claim to citizenship in the Nation. (See decision of the Supreme Court in the case of the United States *v.* Ritchie, 58 U. S. Rep., page 524.)

A very careful and exhaustive consideration has been given to all the cases, and especially to the laws, treaties and constitutional provisions, on which rights to citizenship depend.

Historical Review and the Case of The Eastern Band of Cherokees against the United States and the Cherokee Nation.

In order to thoroughly understand the question of Cherokee citizenship, an historical review of the Cherokee Nation will be of interest. The Supreme Court of the United States, March 1, 1886, decided a very important case, which is known as that of the Eastern Band of Cherokee Indians against the United States and the Cherokee Nation. This case is reported at length in Vol. 117 United States Reports, pages 288 to 312. It was taken to the Supreme Court on appeal from the Court of Claims, and was by that court decided June 1, 1885. (20th Court of Claims Reports, pages 449 to 483.) The opinion of the court in each case was concurred in by all the judges. The opinion of the Supreme Court was pronounced by Mr. Justice Field, and that of the Court of Claims by Chief Justice Richardson. I have thus specifically mentioned this case on account

of its great importance and bearing upon the question of citizenship in the Cherokee Nation. I will adopt the Historical Review of the case which is found in the opinion of the Supreme Court of the United States, for the reason that it shows the construction which the Supreme Court put upon the treaties made with the Cherokee Nation. It is as follows:

"This case comes before us on appeal from the Court of Claims. It was brought to determine the right of the petitioners, called the Eastern Band of the Cherokee Indians, to a proportionate part of two funds held by the United States in trust for the Cherokee Nation. One of the funds was created by the treaty with the Nation made December 29, 1835, at New Echota, in Georgia, commuting certain annuities into the sum of $214,000. The other arose from the sales of certain lands of the Nation lying west of the Mississippi River.

"The suit by the petitioners was authorized by an act of Congress, and it is brought against the United States and the Cherokee Nation. (22 Stat. at L., 581, chap. 141.) The United States, however, have no interest in the controversy, as they hold the funds merely as trustee. They stand neutral, therefore, in the litigation, although as a matter of form they have filed an answer traversing the allegations of the petition.

"The general grounds upon which the petitioners proceed and seek a recovery is, that the Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation; that by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokees and the Western Cherokees; and that the petitioners constitute a portion of the former, and as such are entitled to a proportionate share of the funds which the United States held in trust for the Nation.

"This claim is resisted, upon the ground that the two branches, into which it is admitted the Nation was once divided, subsequently became reunited, and have ever since constituted one Nation, known as the Cherokee

Nation, and that as such it possesses all the rights and property previously claimed by both, and that the petitioners have not, since the treaty of New Echota, constituted any portion of the Nation.

"To determine the merits of the respective claims and pretentions of the parties, it will be necessary to give some account of the different treaties between the Cherokees and the United States, and to refer to the several laws passed by Congress to carry the treaties into effect and accomplish the removal of the Indians from the former home east of the Mississippi to their present country west of that river.

"When that portion of North America which is now embraced within the limits of the United States east of the Mississippi was discovered, it was occupied by different tribes or bands of Indians. These people were destitute of the primary arts of civilization, and with a few exceptions had no permanent buildings, occupying only huts and tents. Their lands were cultivated in small patches and generally by women. The men were chiefly engaged in hunting and fishing. From the chase came their principal food, and the skins of animals were their principal clothing. The different tribes roamed over large tracts and claimed a right to the country as their territory and hunting grounds. Of these tribes, the Cherokee Indians constituted one of the largest and most powerful. They claimed the principal part of the country now composing the States of North and South Carolina, Georgia, Alabama, and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely usufructuary; affording protection against individual encroachment, but always subject to the control and dispositions of those governments, at least, so far as to prevent, without their consent, its acquisition by others. Such superior right rested upon the claim asserted by England, of prior discovery of the country, and was respected by other European nations. There was no nation, therefore, to oppose this assertion of superior right to control the disposition of the lands, and to acquire the title of the Indians, except the Indians themselves; and by treaties with them from time to time

their title and interest were conceded to the United States.

"On the 28th of November, 1785, the United States made its first treaty with the Cherokees. (7 Stat. at L., 17.) It was concluded at Hopewell, on the Keowee, between commissioners representing the United States on the one part and the 'head men and warriors of all the Cherokees on the other.' By it the Indians, for themselves and their respective tribes and towns, acknowledged that all the Cherokees were under the protection of the United States, and of no other sovereign. The treaty promised peace to them and the favor and protection of the United States, on the condition of the restoration to liberty of certain prisoners whom they had captured, and of the return of certain property which they had seized. It also prescribed the boundary between them and the citizens of the United States of lands allotted to them for their hunting grounds. These lands embraced large tracts within the States mentioned. The ninth article provided that, for the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States should 'have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such manner as they think proper.' By this treaty the Cherokees were recognized as one people, composing one tribe or nation, but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs.

"On the 2d of July, 1791, another treaty was made with the Cherokees, in which they were described as the 'Cherokee Nation.' (7 Stat. at L., 39.) Its representatives were designated as the 'chiefs and warriors of the Cherokee Nation of Indians;' and the first article declared that 'There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee Nation of Indians.' And the chiefs and warriors, 'for themselves and all parts of the Cherokee Nation,' acknowledge themselves and the Cherokee Nation to be under the protection of the United States, and of no

other sovereign. The treaty also renewed the agreement on the part of the Cherokees, that the United States should have the sole and exclusive right of regulating their trade and readjusting the boundary between the citizens of the United States and the 'Cherokee Nation,' by which the hunting grounds were reduced in quantity; and in consideration of this reduction the United States agreed to deliver certain valuable goods to the chiefs and warriors for the use of the Nation, and to pay to the Nation annually the sum of $1,000. A further article increased the amount to $1,500.

"The boundaries of the hunting grounds were from time to time changed by subsequent treaties, and by each succeeding one their extent was reduced; in consideration of which a larger quantity of goods were promised to the Nation; and the annuity was increased until, in the year 1805, it amounted to $10,000. (7 Stat. at L., 43, 62, 93.) This annuity was regularly paid to the Cherokee Nation, as represented by the Indians occupying the territory east of the Mississippi River, until the treaty of July 8, 1817. (7 Stat. at L., 156.) That treaty originated from a division of opinion among the Cherokees as to their mode of life, which existed when the first treaty with the United States was made in 1785, and which had from that time increased. There were numerous settlements or towns within the territory allotted to the Indians. Those who occupied the upper towns, which were mostly in the State of North Carolina, desired to engage in the pursuits of agriculture and civilized life; while those who occupied the lower towns in the Valley of the Mississippi desired to continue the hunter life; and owing to the scarcity of game where they lived, to remove across the Mississippi River to vacant lands of the United States. As early as 1808 a deputation from the lower and upper towns, authorized by the Cherokee Nation, came to Washington to declare to the President their desires and inform him of the impracticability of uniting the whole Nation in the pursuits of civilized life, and to request the establishment of a division line between the two classes of towns. The treaty of 1817, which was made with the chiefs, head men, and warriors of the Cherokee Nation east of the Mississippi River, and the chiefs, head men,

and warriors of the Cherokee on the Arkansas River, recites the action of this deputation and the reply of the President to the parties, made on the 9th of January, 1809, which was, in substance, that the United States were the friends of both parties, and, as far as could be reasonably asked, were willing to satisfy the wishes of both; that those who remained might be assured of their patronage, aid, and good neighborhood; that those who wished to remove would be permitted to send an exploring party to reconnoiter the country on the west of the Arkansas and White rivers and higher up; that when this party should have found a tract of country suiting the emigrants and not claimed by other Indians, the United States would arrange with them to exchange it for a just proportion of the country they should leave, and to a part of which, according to their numbers, they had a right; and that every aid towards their removal and what would be necessary for them there would then be freely extended to them.

"The treaty recites that, relying upon these promises of the President, the Cherokees explored the countryon the west side of the Mississippi and made choice of the country on the Arkansas and White rivers, and settled upon lands of the United States to which no other tribe of Indians had any just claim, and that they had duly notified the President thereof, and of their desire for a full and complete ratification of his promise. To that end, as notified by him, they had sent there agents with full powers to execute a treaty relinquishing to the United States their right, title, and interest to all lands belonging to them as part of the Cherokee Nation, which they had left and which they were about to leave, proportioned to their numbers, including with those now on the Arkansas those who were about to remove thither. The treaty then proceeds to recite that, to carry into effect in good faith the promise of the President and to promote a continuation of friendship with their brothers on the Arkansas river, and for that purpose to make an equal distribution of the annuities secured by the United States to the whole Cherokee Nation, its articles were agreed upon. These were, in substance, that the chiefs, head men, and warriors of the whole Cherokee Nation ceded to the United

States certain lands lying east of the Mississippi, and the United States, in exchange for them, bound themselves to give to the branch of the Cherokee Nation on the Arkansas as much land on that river and the White River as they had received, or might thereafter receive, from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the Nation on the Arkansas, agreeably to their numbers. The United States also agreed to give to each poor warrior who might remove to the western side of the Mississippi a rifle gun, with ammunition and other articles, to pay for all improvements of real value to their land, and to give of the lands surrendered to the United States to every head of an Indian family residing on the east side of the Mississippi, who might wish to become a citizen of the United States, 640 acres. It was also agreed that the annuity due to the whole Nation for the year 1818 should be divided between the two branches of the Nation, according to their respective numbers, to be ascertained by a census to be taken. Previous treaties between the United States and the Cherokee Nation were to continue in force with both of its branches, each to be entitled to all the immunities and privileges which the Old Nation enjoyed under them.

"On the 27th of February, 1819, another treaty was made with the Cherokee Nation (7 Stat. at L., 195), represented by its chiefs and head men. By it a further cession of lands was made to the United States, and it was agreed that the annuity to the Nation should be paid as follows: Two-thirds to the Cherokees east of the Mississippi and one-third to the Cherokees west of that river. This apportionment was based upon the estimate that those who had emigrated and those who were enrolled for emigration constituted one-third of the Nation, instead of upon a census to be taken, as mentioned in the treaty of 1817. The annuity, thus divided, was regularly paid as stipulated until commuted by the treaty of December, 1835, of which we shall presently speak.

"On the 6th of May, 1828, a treaty was made with the chiefs and head men of the Cherokee Nation of Indians west of the Mississippi. (7 Stat. at L., 311.) This was

the first time that the Cherokees west of the river were recognized so far as a distinct and separate political body from the Cherokees east of the river as to call for separate treaty negotiations with them. The treaty recited, as among the causes of it being made, that it was the anxious desire of the Government to secure to the Cherokee Nation of Indians, as well as those then living within the limits of Arkansas as those of their friends and brothers residing in States east of the Mississippi, who might wish to join their brothers west, a permanent home, which should, under the guaranty of the United States, remain forever theirs; and that the present location of the Cherokees in Arkansas was unfavorable to their repose, and tended to their degradation and misery. By it the United States agreed to put the Cherokees in possession of, and to guarantee to them forever, seven million acres of land which were specifically described, and which are situated in what is now known as the Indian Territory, and also to give and guaranty to the Cherokee Nation a perpetual outlet west of these lands, and a free and unmolested use of the country so far as their sovereignty and right of soil extended. They also agreed to pay for all improvements on the land abandoned; and, in order to encourage the emigration of their brothers remaining in the States, to give to each head of a Cherokee family then residing within any of the States east of the Mississippi, who might desire to remove west, on enrolling himself for emigration, a good rifle and certain other articles to make just compensation for their property abandoned; to bear the cost of their emigration, and to procure provisions for their comfort, accommodations, and support by the way, and for twelve months after their arrival at the agency. On the other hand, the chiefs and head men of the Cherokee Nation west re-ceded to the United States the lands to which they were entitled on the Arkansas under the treaties of July 18, 1817, and of February 27, 1819, and agreed to remove from the same within fourteen months.

"From this time until the treaty of New Echota, concluded December 29, 1835 (7 Stat. at L., 748), the Cherokees were divided into two branches, so far as consti-

tuting distinct political bodies, that the United States had separate negotiations with each; and on the 14th of February, 1833, by a treaty with the chiefs and head men of the Cherokee Nation west of the Mississippi, the United States renewed their guaranty of seven million acres of land, and of the perpetual outlet to the Nation west of those lands, and of the free and unmolested use of the country west.

"In the meantime (from the treaty of 1828 until the treaty of New Echota) the Cherokees remaining east of the Mississippi were subjected to harassing and vexatious legislation from the States within which they resided. The United States had, as early as 1802, agreed with Georgia, in consideration of her cession of western lands, to extinguish the Indian title to lands within the State. North Carolina claimed that the United States were under a similar obligation to extinguish the Indian title to lands within her limits, in consideration of a like cession of western lands, although there was no positive agreement to that effect. And with the extinguishment of their title, it was expected that the Indians themselves would be removed to the territory beyond the bounds of those States. At the time the treaty of 1828 was made a great deal of impatience had been exhibited by the people of those States at the little progress made in the extinguishment of the Indian title, and at the continued presence of the Indians. Severe and oppressive laws were passed by Georgia, in order to compel them to leave; and though less severity was practiced in North Carolina towards the Indians in that State an equally pronounced desire for their departure was expressed. Angry and violent disputes between them and the white people in both States, but more particularly in Georgia, were of frequent occurence. (See case of Cherokee Nation *v.* Georgia, as reported in a separate volume by Richard Peters in 1831 (see 30 U. S. bk. 8, L. ed. 1); also a document called 'The Public Domain,' prepared by the Public Land Commission, and published as Ex. Doc. 47, H. of R., 46th Cong., 3d Sess., and Doc. No. 71 of H. of R., 23d Cong., 1st Sess.)

"The treaty of New Echota was made to put an end

to those troubles and secure the union of the divided Nation. It recites as motives to its negotiations, among other things, that the Cherokees were anxious to make some arrangement with the Government of the United States, whereby the difficulties they had experienced from residence within the settled parts of the country under the jurisdiction and laws of the State governments, might be terminated and adjusted, and they be reunited into one body, and be secured a permanent home for themselves and their posterity in the country selected by their forefathers, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such state of society as might be most consonant with their views, habits, and conditions, and as might tend to their individual comfort and their own advancement in civilization. By its stipulations the Cherokees ceded to the United States all lands owned, claimed, or possessed by them east of the Mississippi River, and all claims for spoliations of every kind, for the sum of $5,000,000, and agreed to remove to 'their new home' west of the Mississippi within two years from its ratification.

"The treaty also recited the cession to the Cherokee Nation by previous treaties of the 7,000,000 acres, and the guaranty of a perpetual outlet west of these lands, and a free and unmolested use of all of the country, so far as the sovereignty of the United States and their right to the soil extended; and also that it was apprehended by the Cherokees that in this cession there was not a sufficient quantity of land for the accommodation of the whole Nation, and, therefore, the United States agreed, in consideration of $500,000, to convey by patent to the Indians and their descendants an additional tract of 800,000 acres; and that the lands previously ceded, including the outlet, should be embraced in the same patent. (Art. 2.) They also agreed to remove the Indians to their new home, and to subsist them one year after their arrival there, except that such persons and families, as the opinion of 'the emigrating agent' were capable of subsisting and removing themselves, should be permitted to do so, and should be allowed for all claims for the same $20 for

each member of their families; and, in lieu of their one year's rations, should be paid the sum of $33.33, if they preferred it. (Art. 8.)

"It was also agreed that after deducting the amount which should be actually expended for the payment for improvements, claims for spoilations, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of the treaty, the balance, whatever the same might be, should be equally divided among all the people belonging to the Cherokee Nation east according to the census completed, and such Cherokees as had removed west after June, 1833; and that those individuals and families that were adverse to removal and were desirous to become citizens of the State wherein they resided, and such as were qualified to take care of themselves and their property, should be entitled to receive their due proportion of all personal benefits arising under the treaty for their claims, improvements, and their *per capita*, as soon as an appropriation was made to carry out the treaty. (Arts. 12, 15.)

"By the eleventh article, 'The Cherokees, believing it would be for the interest of their people to have all their funds and annuities under their own direction and future disposition,' agreed to commute their permanent annuity of $10,000 for the sum of $214,000, the same to be invested by the President of the United States as part of the general fund of the Nation.

"In the following year Congress made the requisite appropriation for the commutation, and according to the tenth article of the treaty the money was invested for the benefit of the whole Cherokee Nation which had removed or should subsequently remove to the lands assigned to it west of the Mississippi. This is one of the funds of which the petitioners claim a part in proportion to their numbers as compared with the citizens of the Cherokee Nation living west of the Mississippi on the territory ceded. The provisions of the treaty as to the investment, custody, and distribution of the income of this fund and all other funds belonging to the Nation, remained in

force until the treaty of July 19, 1866. The interest was paid over annually to the agents of the Cherokee Nation authorized to receive the same, and was subject to application by its council to such purposes as they deemed best for the general interests of their people. The treaty of 1866 (art. 23, 14 Stat. at L., 805) provided that all funds then due the Nation, or that might thereafter accrue from the sale of its lands by the United States, as provided for, should be invested in United States registered stocks at their current value and the interest on said funds should be paid semi-annually on the order of the Cherokee Nation and be applied to the following purposes, to wit., 35 per cent. for the support of the common schools of the Nation and educational purposes, 15 per cent. to the orphan fund., and 50 per cent. for general purposes, including reasonable salaries of district officers.

"Immediately after the ratification of the treaty of 1835 measures were taken by the Government to secure its execution and commissioners were appointed to adjust claims for improvements and facilitate the emigration of the Indians. But emigration proceeded slowly. Great reluctance to go was manifested by large numbers, and at last it became necessary to make a display of force to compel their removal. Major-General Scott was sent to the country with troops and instructed to remove all Indians except such as were entitled to remain and become citizens under the twelfth article of the treaty. The number that remained was between eleven and twelve hundred. They were without organization or a collective name. They ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided. The name of the Eastern Cherokees accompanied those who emigrated, to distinguish them from those who had preceded them and who were called Old Settlers.

"After the reunion of the Cherokee people on their lands west of the Mississippi, resulting from the execution of the treaty, and on the 12th of July, 1839, the following Act of Union between the Eastern and Western Cherokees was adopted;

"Act of Union Between the Eastern and Western Cherokees."

" 'Whereas, our fathers have existed as a separate and distinct Nation, in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending into antiquity, beyond the records and memory of man; and whereas, these attributes, with the rights and franchises which they involve, remain still in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee people, under which a portion of our people removed to this country and became a separate community (but the force of circumstances having recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

" 'Therefore, we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

" 'In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major General Scott for their removal to this country

shall continue in charge of that business, with their present powers, until it shall be finally closed; and also, that all rights and titles to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforth vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"'Given under our hands at Illinois camp grounds this 12th day of July, 1838.

"'By order of the National Convention.

"'GEORGE LOWERY,
President of the Eastern Cherokees.

his
GEORGE X GUESS,
mark.
President of the Western Cherokees.'

"On the 6th of September following they adopted a constitution of government, in which they recited that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation. The second clause of its first article is as follows:

"'The lands of the Cherokee Nation shall remain common property, but the improvements made thereon and in possession of the citizens of the Nation are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements as expressed in this article shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limits of this Nation and become a citizen of any other government all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, That the national council shall have power to readmit by law to all the rights of citizenship any person or persons who may

at any time desire to return to the Nation on memorializing the national council for such readmission.'

"But notwithstanding this declared reunion of the divided Cherokees, there was much bitter feeling between the old settlers and the new comers, leading to violent contests and causing in many instances great loss of property and life. The new comers being the more numerous, claimed to control the government of the country, and endeavored to compel the old settlers to submit to their rule. The old settlers had an organization of their own, and complained that the new comers occupied their lands and overthrew their organization. And among the new comers also there was a bitterness between those who had favored the treaty of removal from the east side of the Mississippi and those who had opposed it. The former sided with the old settlers, but the latter outnumbered both. Violent measures were resorted to on both sides to carry out their purposes, and there was little security for person or property. The situation became intolerable; and in 1845 the contending factions—the old settlers, the treaty party, and the anti-treaty party—sent delegates to Washington to lay their grievances before the officials of the United States Government, in the hope that some relief might be afforded them. The old settlers and the treaty party desired the division of the people into two nations and a division of the territory. Demands also were made by each party against the United States under the stipulations of the treaty of New Echota. These circumstances led to the treaty of August 6, 1846. It was negotiated on the part of the Cherokees by delegates appointed by the regularly constituted authorities of the Cherokee Nation, and by delegates appointed by and representing that portion of the tribe known and recognized as Western Cherokees or the Old Settlers. It recited that serious difficulties had for a considerable time existed between the different parties of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled, so that peace and harmony might be restored among them; and that certain claims existed on the part of the Cherokee Na-

tion and portions of the Cherokee people against the United States; and that, with a view to the final and amicable settlement of these difficulties and claims, the parties had agreed to the treaty. (9 Stat. at L., 871.)

"It declared that all difficulties and differences existing between the several parties of the Cherokee Nation were settled and adjusted; and that they should, as far as possible, be forgotten and forever buried in oblivion; that all party distinctions should cease, except so far as they might be necessary to carry the treaty into effect; that a general amnesty should be proclaimed; and that all offenses and crimes committed by a citizen or citizens of the Cherokee Nation against the Nation or an individual were pardoned. It was agreed also that all parties were to unite to enforce laws against future offenders, and that laws should be passed for equal protection and for security of life, liberty and property. Thus the personal dissensions were to a great extent healed.

"The treaty also declared that the lands occupied by the Cherokee Nation should be secured to the whole Cherokee people for their common use and benefit, and that a patent should be issued for the same, including the 800,000 acres purchased, together with an outlet west; thus recognizing that all the lands ceded by the United States for the benefit of the Cherokees west of the Mississippi belonged to the entire Nation, and not to any of the factions into which the Nation was divided. The treaty also made provision for the adjustment and payment of the claims of different parties. The ninth article is as follows:

"'The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of the 29th of December, 1835, which said settlement shall exhibit all money properly expended under said treaty; shall embrace all sums paid for improvements, ferries, spoliations, removal and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said Nation, and several sums provided in the several articles of the treaty to be invested as the general funds of the Nation; also

all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of the said several sums shall be deducted from the sum of $6,647,067; and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto.'"

"By the treaty of July 19, 1866 (14 Stat. at L., 797), provision was made for the settlement of friendly Indians on certain unoccupied lands of the Cherokees west of the Mississippi; and for the sale of their interests, and also for the sale of other lands belonging to them in the State of Kansas, and the investment of the proceeds in registered stocks of the United States for the benefit of the Cherokee Nation. Under it, and pursuant to other laws, sales were made of the lands mentioned, and also other lands west of the Mississippi ceded to the Cherokees under the different treaties, to which we have referred, and the proceeds have been invested, as required by article 23 of the treaty. The investment constitutes one of the funds of which the petitioners seek a proportionate part * * *"

Chief Justice Richardson, in his opinion in the Court of Claims, also recites at length the history of negotiations and treaties with the Indians which led up to and formed the basis of the case. It will be seen by careful examination of the foregoing treaty stipulations, that the Indians who constituted the Eastern Band of Cherokees separated themselves from the Cherokee Nation proper. This separation was provided for in article 12 of the treaty of 1835, which was concluded at New Echota. The article is as follows:

"ARTICLE 12. Those individuals and families of the Cherokee Nation that are averse to a removal to a Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their

property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita as soon as an appropriation is made for this treaty."

The condition of the Eastern Band and the political status are thus described in the opinion in the Court of Claims by Chief Justice Richardson:

"The fact that those who remain were Cherokee Indians by blood and race could not be blotted out, and they were so called, but their connection with the Cherokee Nation was completely severed.

"They had no further voice in its councils nor in its affairs. They were not subject to its laws, and they owed to it no allegiance, The Cherokee Nation, as a body politic, never afterwards recognized them as a part of the Nation in any form or manner whatever. The only privilege ever accorded them by the Nation was that they might become citizens and subjects upon removal within its territorial boundaries, and they accord that to all those who are Cherokees by blood or race, wherever they may come from.

"They had expatriated themselves from the Cherokee Nation, and had become denizens and subjects, if not citizens, of the States where they resided. Thomas, their agent and attorney, wrote that by the constitution and laws of the State they had the right to vote, though they seldom exercised it, lest by identifying themselves with one political party they should give offense to the other. (Ex. Doc. No. 298, 1st session, 29th Congress, p. 181.) Whatever organizations they subsequently effected must have been mere social organizations, with no power as an independent nation of their own to make laws or to do other national acts. That follows from their relations to the State of North Carolina.

"They were never afterwards recognized by the United States as any part of the Cherokee Nation as a body politic."

Congress has passed acts from time to time by which

there was paid to every Cherokee Indian in the Eastern Band his proportion of the per-capita money, and Congress has funded an amount of money equal to the removal and subsistence allowance of each of said Indians and paid the interest to them regularly, and the principal sum of $53.50 to each one who subsequently went west, until 1852.

Chief Justice Richardson, in his opinion, page 478, says:

"The claimant relies much upon the language of the first article of the treaty of 1846, securing the lands west to the 'whole Cherokee people, for their common use and benefit,' as giving the North Carolina Cherokees and the claimant band an interest therein whenever any part should be sold. Even independently of the contemporaneous construction by all parties, which strengthen our views, we have no doubt that the 'whole Cherokee people' there referred to were the three parties into which the Cherokee Nation was then divided by dissensions, and not by locality—*First*, the 'Eastern Cherokees,' meaning those who removed west after the treaty of 1835–1836, and who constituted the governing party, or, as their delegates signed themselves, the 'Government Party'; *second*, the 'Treaty Party,' and, *third*, the 'Old Settlers,' all mentioned in that treaty.

"If, however, the whole 'Cherokee People' there mentioned included the North Carolina Cherokees, the very language repels the idea of any partition between them. To enjoy the benefit of the common lands they must go and enjoy the same with their brethren, according to the customs, laws, and usages of the Nation. There is not a single word in either of the treaties that implies a partition of lands or a division of the funds of the Cherokee Nation. All is distinctly either declared or implied to be 'in common.' In clear violation of the idea of common property, the present claimant is seeking a division of it."

The concluding portion of the decision of the Court of Claims is as follows:

"The demands of the present Eastern Band of Chero-

kees and its members are in conflict with these express provisions of the constitution and laws of the Cherokee Nation, to which they are claiming to belong. They are demanding a division of trust funds which the United States holds as the common property, and that, too, while they are living without the limits of the Nation, and are, to all intents and purposes, citizens of another government, in utter disregard to the traditions, constitution, and laws of the Cherokee people.

"Throughout this opinion we have treated the proceeds of the sale of the common lands as the common property of the Nation precisely as were the lands before such sale. Those proceeds have been invested and the income of the investments is paid out in accordance with the terms of the treaty of 1866 (14 Stat. at L., 805), for the benefit of the Cherokee Nation as a body politic.

"If the Indians east of the Mississippi River wish to enjoy the common benefits of the common property of the Nation in whatever form it may be, whether in permanent fund or in the proceeds of the sale of common lands, they must comply with the constitution and laws and become readmitted to citizenship as therein provided. They can not have a divided share of the common property of the Nation and thus gain rights and privileges not accorded to any other Cherokee Indians—the living out of the national territory, avoiding subjecting themselves to the laws of the Nation, dividing its common funds and common property, and managing their affairs wholly independent of national authority. Such an admission of right might break the nation into innumerable bands and scatter into fractions funds which, by treaties with the United States, and by the constitution and laws of the Indians themselves, have been dedicated as common funds to the common and not divided benefit of the Nation.

"In our opinion the Eastern Band of Cherokee Indians, claimants in this case, have no rights in law or in equity in and to the moneys, stocks and bonds held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi River, nor in and to a certain other fund, commonly called the permanent annuity fund, mentioned in the act of

March 3, 1883 (22 Stat. at L., 585), referring the case to this court; and a decree will be entered to that effect."

The opinion of the Supreme Court of the United States in this case concludes as follows:

"Their claim (Eastern Band of Cherokees), however, rest upon no solid foundation. The lands from the sales of which the proceeds were derived belong to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest in common that he could claim a pro-rata share of the proceeds of the sales made of any part of them. He had a right to use parcels of the land thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our Government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members. Such was substantially the language and such the decision of the Attorney General of the United States in a communication made to the President, in 1845, with reference to the treaty of New Echota. 'The Executive of the United States,' he said, 'must therefore regard the treaty of New Echota as binding on the whole Cherokee Tribe; and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions. As a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights. They can not take its benefits without submitting to its burdens. The Executive must regard the treaty as the supreme law, and as a law construe its provisions.' (4 Ops. Attorney-Gen., 437.)

"Whatever rights, therefore, the Cherokees in North Carolina who refuse to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from the sales of portions of such lands, are in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation must depend entirely upon the treaties out of which those funds originated. They have as yet received nothing from either of them, and they can claim nothing by virtue of the fact that the lands of the Nation, which its authorities ceded to the United States, were held for the common benefit of all the Cherokees. All public property of the Nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

"The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court of Claims in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a nation in whole or in part. (20 Ct. Cl.)

"Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west and preferred to remain and become citizens of the States in which they resided were promised certain moneys; but there is no evidence that the petitioners have succeeded to any of their rights. The original claimants have probably all died, for fifty years

have elapsed since the treaty of 1835 was made, and no transfer from them or their legal representatives is shown. But assuming that the petitioners probably represent all rightful demands of the Cherokees living in North Carolina when the treaty was made, what were those demands? As designated by articles 12 and 15 of the treaty, these Cherokees were to receive 'their due portion of all the personal benefits accruing under the treaty for their claims, improvements, and per capita.' The term 'claims' had reference to demands for spoliations of their property which existed prior to the treaty. The improvements were those made on the property ceded. By per capita was meant the proportionate amount, given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi after deducting certain expenditures mentioned in article 15. Whatever may have remained for the per capita distribution of the $5,000,000 received for the lands after the deduction mentioned, it is plain that it constituted no portion of the moneys that formed the fund of which the petitioners seek by this suit a proportionate part. By the treaty of 1846 certain sums were allowed in addition to the $5,000,000 specified in the treaty of 1835, and from the whole amount certain items other than those three designated were to be deducted, and the balance was to be paid over per capita in equal amounts to all the individuals, heads of families, or their legal representatives entitled to receive it under that treaty. But this change in no respect affects the case.

"While the treaty of 1846 was under negotiations, one William H. Thomas appeared in Washington as the representative of Cherokees in North Carolina and urged a recognition of their demands for the per capita money and the removal and subsistence money under articles 8 and 12 of the treaty of 1835. He had obtained a statement from one of the commissioners who negotiated that treaty on the part of the United States, from several respectable persons who were privy to the negotiations, and from some of the Cherokees who signed the treaty, as to the meaning which should be given to certain terms used in it; and we are referred to these documents as though they should have some influence upon the

construction of those terms. But it is too plain for controversy that they can not be used to control the language of the treaty or guide in its construction.

"The per capita money and the removal and subsistence money had not been paid when the treaty of 1846 was made, but the Court of Claims finds that since then they have been paid. The claim now presented by the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by the sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designations in the treaty of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as 'the common property of the Nation,' or as held for the common use and benefit of the Cherokee people, has no substantial foundation. If Indians in that State, or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship, as there provided. They can not live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States for the benefit of the United Nation, and not in any respect for those who have separated from it and become aliens to their Nation.

"We see no just ground on which the claim of the petitioners can rest to share in either of the funds held by the United States in trust for the Cherokee Nation, and the decree of the Court of Claims must, therefore, be affirmed; and it is so ordered."

We have quoted thus extensively from this important case for the reason that the historical review given in the opinions in this case, and the legal principles involved, are of the utmost importance in determining the rights of many persons to citizenship in the Cherokee Nation

at this time. In some of the briefs of attorneys for claimants, it is contended that the opinion of the Supreme Court and the Court of Claims in the case of the Eastern Band of Cherokees are mere dicta, and not applicable to the cases now pending in this court. It will be seen, however, in the further consideration of the cases now pending, that the opinion in the case of the Eastern Band of Cherokees are very important and controlling upon many features which may be presented.

It is true that the parties now applying for citizenship in the Cherokee Nation were not all parties to the treaty concluded at New Echota, and were not interested in the suit decided by the Court of Claims and affirmed by the Supreme Court. But many of the applicants for citizenship now before this court claim to be the descendants of the North Carolina, or Eastern Band, of Cherokee Indians, and in so far as the rights of the Indians belonging to that band were determined by the Supreme Court, the decision would be applicable and decisive as to all claiming through them.

Legal Propositions Established.

In the opinion of this court the following propositions are clearly established by the decision of the Supreme Court of the United States and the United States Court of Claims in the case of the Eastern Band of Cherokees against the Cherokee Nation and the United States, viz.:

FIRST. That the lands and other property of the Cherokee Nation belong to it as a political body, and not to the individual members. The lands are held as communal property, not vested in the Cherokees as individuals, either as tenants in common or joint tenants. (See, also, opinion by Chief Justice Fuller of the Supreme Court in the case of The United States *against* The Old Settlers, 148 U. S., 427.)

SECOND. That the North Carolina Cherokees, who are now known as the Eastern Band, who refused to join their countrymen in the removal to the land ceded to the Cherokee Nation west of the Mississippi river, thereby dissolved their connection with what is now known as

the Cherokee Nation. They became citizens of the States and subject to the laws of the States in which they resided, and have no right, title, or interest in the lands or other property of the Cherokee Nation as now constituted. They have received their due proportion of all the personal benefits accruing under the treaty of 1835–'36 for their claims, improvements, and per capita. Since their separation from the Cherokee Nation they have had no right to any portion of the lands or common property of the Nation, or to any lands or property held for the common use and benefit of the Cherokee people who constitute said Nation.

THIRD. That the phrase, "the whole Cherokee people," used in the treaty of 1846, refers to those Cherokees only whose representatives participated in the making and ratification of the treaty, viz., the Cherokee Nation proper, the treaty party, and the Old Settlers or Western Cherokees. Those Cherokees only were the recognized citizens of the united Cherokee Nation, and no other Cherokees were entitled to the rights and privileges of citizens of the Cherokee Nation as now constituted.

FOURTH. If the Eastern Band of Cherokees, or the Cherokees in all the States of the Union, wish to enjoy the benefits of the common property of the Cherokee Nation in whatever form it may exist, they must, as held by the Supreme Court and by the Court of Claims, comply with the constitution and laws of the Cherokee Nation, and be readmitted to citizenship as therein provided. They can not live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the land, funds, and common property of the Nation. These lands, funds, and property were dedicated by the Cherokee constitution, and were intended by the treaties with the United States, for the use and benefit of the united nation, and not in any respect for the use and benefit of those who have separated themselves from it and become aliens to the Nation.

The Land Tenure.

The constitution of the Cherokee Nation, article 1,

section 2, provides that the lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may be rightfully in possession of them. The patent of the United Statest o the Cherokee Nation, issued on the 31st day of December 1838, provides as follows:

"Therefore in the execution of the agreements and stipulations contained in the said several treaties, the United States has given and granted, unto the said Cherokee Nation the two tracts of land so surveyed, and herein before described, containing in the whole 14,374,135 and 14-100 of an acre, to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plains of the western prairie, referred to in the second article of the treaty of the 29th of December, 1835," &c.

And subject, among other things, to the further condition "That the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandoned the same."

It will be seen from the text of the patent by which the Cherokee Nation holds the lands belonging to it, that the title is in fee simple with certain conditions, called a base or qualified fee. The citizens who occupy the lands of the Cherokee Nation have no title to the soil, but merely a right to occupy such portions of the soil as they may cultivate, under the laws of the Nation. The citizen occupant, not having any title to the land but owning the improvements only, can not be said to be either a tenant in common or a joint tenant with any other citizen of the Nation, because the tenure implies title of some kind in the tenant. Tenants in common have a unity of possession, because no man can tell which part is his own. (Browne's Blackstone's Commentaries, page 263.)

Hence the possession of one citizen of a portion of the land of the Nation is in no sense a tenancy in common.

Nor are the citizens of the Nation joint tenants, for joint tenants of land hold in fee simple or otherwise, and there must be a unity of interest, a unity of title, a unity of time, and a unity of possession. In other words, the joint tenants have one and the same interest secured by one and the same conveyance, commencing at one and the same time and held as one individual possession. (*Ib.*, 256.)

These definitions, therefore, do not apply to any condition existing in the Cherokee Nation as to land tenure and occupancy. A citizen of the Cherokee Nation has the exclusive right to the occupancy of the land upon which he has made improvements, or of which he is rightfully in possession. No other citizen of the Nation has any right to occupy the particular tract occupied by another citizen; therefore, the citizens of the Nation are neither joint tenants with other citizens of the Nation or tenants in common. They occupy the lands in severalty—each holding the possession in his own right only, without any other person being joined or connected with him in point of interest during his occupancy. They are merely occupants in severalty.

The United Nation.

The Indians who by the treaty of 1835 agreed with the United States to emigrate west of the Mississippi River were finally located in what is now known as the Cherokee Nation. The Western Cherokees, known as the Old Settlers, had preceded them to this country. A new Nation was formed to consist of the Eastern and Western Cherokees. This act of union between the Eastern and Western Cherokees was agreed to on the 12th of July, 1838. In September following, as heretofore set forth in the opinion of the Supreme Court, a constitution of government was adopted in which it was recited that the Eastern and Western Cherokees had become united in one body politic under the style and title of the Cherokee Nation. Notwithstanding the formation of this union and the establishment of a new constitution and a new Nation, all was not peace and harmony. Dissension arose which led to the formation of the treaty

of 1846. This treaty was made and concluded between the following parties:

FIRST. The United States.

SECOND. The Cherokee Nation.

THIRD. The Treaty Party, which was a faction of the Cherokee tribe of Indians at that time.

FOURTH. By the Old Settlers or Western Cherokees.

This treaty recites the fact that serious difficulties for a considerable time past had existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it was desired should be speedily settled, so that peace and harmony might be restored among them. With a view to final and amicable settlement of these difficulties, that treaty was agreed to.

The first article provides, among other things, that "the lands now occupied by the Cherokee Nation shall be secured to the whole people for their common use and benefit."

The words, "the whole Cherokee people," mentioned in this article evidently refer to the parties who participated in the formation of the treaty, and, as Chief Justice Richardson held in his opinion, to which reference is made, these words did not embrace what is known as the Eastern Band of Cherokees, nor do they embrace the Cherokees who had separated themselves from the tribe and taken up their residence in the States.

Three Classes of Cherokees.

From these treaties and from provisions in the Cherokee constitutions it will be seen that there were, and have been since the establishment of the present Cherokee Nation west of the Mississippi River, three classes of Cherokee Indians.

FIRST. Those who were citizens of the United Cherokee Nation, the Nation as now constituted, and which occupies the lands ceded to the Nation west of the Mississippi River;

SECOND. The Eastern Band of Cherokees, which constitutes all those individuals and families of the old Cherokee Nation who were adverse to the removal to the Cherokee country west of the Mississippi River, and who were desirous to become citizens of the States in which they lived, and where they then resided; and

THIRD. Those Cherokees, mentioned in the constitution of the United Cherokee Nation, and also in the constitution of the old Cherokee Nation, who were described as follows: "Citizens who shall remove with their effects out of the limits of this Nation and become citizens of another government." Such Indians were declared by the Cherokee constitution to have forfeited all their rights and privileges as citizens of the Nation. It was provided, however, with reference to this latter or third class, "that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation, on their memorializing the national council for such readmission."

Those who are now claiming the right to be enrolled as citizens of the Cherokee Nation come within one or the other of the last two classes mentioned.

Who may be Admitted to Citizenship.

This court has no jurisdiction or power under the acts of Congress by means of which the pending cases are being considered to exercise any discretion as to who should or who should not be enrolled as citizens of the Cherokee Nation. It has the power simply to determine who are legally citizens thereof, and who ought to be so regarded, but who are now denied the rights and privileges of citizenship by said Nation. The law of Congress conferring jurisdiction on this court to consider these cases provides that the United States commission "shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

While no rule of decision is laid down in the act of

Congress for this court, it will be assumed that the same provisions of law apply to this court that were made applicable to the United States commission. The direction is to "respect" all laws of the several nations. What is meant by the word "respect," as used in this connection? There can be but one meaning, and that is that the court and the United States commission should give effect to all such laws. The next phrase in the statute is as follows: "And all treaties with either of said nations or tribes." The word "respect," therefore, applies equally to the treaties as to the laws. The next phrase is as follows: "And shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

This court must, therefore, respect or give effect to all laws of the several nations not inconsistent with the laws of the United States, and must give effect to all treaties with either of said nations, and must give due force and effect to the rolls, usages, and customs of each of said nations or tribes. In this last provision Congress has recognized the fact that the Cherokee Nation has a right to determine who shall be and who shall not be citizens of the Nation. The national council may, in its discretion, confer citizenship upon any person, or it may establish courts or commisions to hear and determine applications for citizenship in the Nation. In determining, therefore, who among those now claiming citizenship should be enrolled as citizens of the Cherokee Nation, this court will look to the laws of the Nation and consider whether those laws are in conflict with the laws of the United States. It will also ascertain who have been lawfully adjudged to be citizens by tribunals or commissions duly authorized to pass upon their applications. And it will consider the treaties that have been made between the United States and the Nation, and it will give due force and effect to the rolls, usages, and customs of the Nation in dealing with citizenship cases.

In order to determine what is the law of the Cherokee Nation, the same rules of construction must be applied as would be applied to the laws of Congress or of any State in this Union. If the law should be found to be in conflict with the constitution of the Cherokee Nation it would be null and void, just as the law of Congress

in conflict with the Constitution of the United States would be null and void.

In considering the treaties which have been made between the Nation and the United States, they must be carried into effect and the true intent and meaning of them must govern. If it should appear that any of the treaties had been abrogated by Congress such treaties would no longer be in force.

In order to give due force and effect to the rolls, usages, and customs of the Nation this court will inquire into such rolls, usages, and customs. Congress has already defined what is meant in the act of June 10, 1896, by the words "rolls of citizenship." The rolls of citizenship as defined by Congress have been confirmed. The amendment act which is found in the Indian appropriation bill passed June 7, 1897, is as follows:

"*Provided* That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation, and the descendants of those appearing on such roll, and such additional names and their descendants as have been subsequently added, either by the council of such Nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such Nation: *Provided, also,* That any one whose name shall be stricken from the roll by

such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

This provision of course will take effect from the date of its passage, and this court will give such construction to the words "rolls of citizenship," used in the act of June 10th, 1896, as is provided for in this amendment.

It is competent for Congress by subsequent acts to declare the meaning which should be given to acts previously passed, and this court will carry into effect the meaning which Congress subsequently provided should be given.

Summary of Citizenship Acts.

The Cherokee Nation has from time to time passed laws for the purpose of ascertaining who were entitled to citizenship in the Nation. It is contended by counsel for the Cherokee Nation that some of the acts of the Cherokee council, in reference to citizenship, are in conflict with the constitution of the Nation. None of these citizenship acts, so far as this court is advised, have been declared unconstitutional by the courts of the Cherokee Nation. They have been recognized as binding upon that Nation. The constitution of the Nation, section 14, article 2, reads as follows: "The national council shall have power to make all laws and regulations which they shall deem proper for the good of the Nation which shall not be contrary to the constitution."

Congress has always conceded to the Nation the right to enact all laws which are not in conflict with the Constitution or laws of the United States, or with the treaties made with the Nation.

The following tribunals and commissions have been created by the acts of the Cherokee council for the purpose of considering citizenship cases:

First. The Supreme Court of the Nation was authorized by an act of December 3, 1869, to consider the claims of all persons whose citizenship was doubtful.

Such persons were required to appear before the Supreme Court on the first Monday of December, 1870, to establish their right. The decision of the court was made final and conclusive.

SECOND. By an act of council November 18, 1878, North Carolina Cherokees were authorized to enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival and make satisfactory showing of being Cherokees. This act was in force one year and twenty days. During this time the Chief Justice was authorized to place on the rolls such of those Cherokees as he should find entitled to citizenship. By act of December 7, 1871, the act was amended so as to limit the power of the Chief Justice to merely receive and hear petitions of all persons claiming the rights of Cherokee citizenship, and to transmit all evidence to the national council at each regular session for final action. This act was repealed December 5, 1876, and was in force five years.

THIRD. By act of the council December 5, 1877, a commission on citizenship was created, which was authorized to take cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee Nation involving the right of citizenship in said Nation as specified in said act. By act of December 5, 1878, the act authorizing this commission was amended so as to extend its jurisdiction to the cases of all claimants to the rights of citizenship who may be at the time of the passage of the act actually residing within the limits of the Nation, and whose cases have not been determined adversely to the claimants by the commission. The commission expired by limitation of law on the 30th day of June, 1879, and was in force one year and six months.

FOURTH. By act of council of November 20, 1879, another commission was created to have cognizance of all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship as therein specified. This act was repealed November 26, 1884, and was in effect five years.

FIFTH. By act of the council December 8, 1886, a third commission was created. This commission was authorized to hear all persons applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicants must be of the lineal descent of persons whose names appear upon the census rolls taken by the United States after the treaty of 1835, and roll of 1848, known as the Mullay rolls, and the roll known as the Sila roll, and the census rolls taken by the United States in 1852, known as the Chapman rolls.

The commission was required to decide these cases in accordance with the constitution of the Cherokee Nation, conferring upon the national council the power to readmit persons to citizenship, and with the decision of the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation. This jurisdiction embraced all classes of Cherokees by blood, except the Old Settlers, who were provided for by an amendment of the council passed May 23, 1887. This commission expired on the second Monday of November, 1889, and was in existence three years.

Numerous other acts in reference to citizenship were from time to time passed by the national council.

By an act of council October 12, 1846, the time within which persons might appear before the council was extended until November, 1846. On October 15, 1841, the Cherokee council passed the following act:

An act relating to persons returning to the Nation.

"*Be it enacted by the National Council,* That all Cherokees, and other persons having Cherokee privileges, who may have been residing out of the limits of the Nation previously to the adoption of the constitution, are hereby exempted from being required to memorilize the the national council for admission to the rights and privileges of citizenship; it is considered that they have the right of returning without the action of the council."

"TAHLEQUAH, *October 15th, 1841.*"

By act of council November 20, 1868, the foregoing act was repealed, the repeal act being as follows:

"An act repealing an act authorizing persons to move into the Cherokee Nation, &c.

"*Be it enacted by the National Council*, That the act passed on the 15th of October, 1841, authorizing certain classes of persons to move into the Cherokee Nation without memorializing the national council be, and the same is hereby, repealed.

"Approved November 20th, 1868."

The following provision will be found in the Cherokee constitution of 1839, viz.:

"The descendants of Cherokee men by all free women except of the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust, under this government."

The following amendment thereto was adopted in 1866, and is now in force:

"SEC. 5. * * * All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen men who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants *who reside within the limits of the Cherokee Nation*, shall be taken and deemed to be citizens of the Cherokee Nation."

It will thus be seen that from October 15, 1841, until November 20th, 1868, a period of twenty-seven years, a general invitation was extended by the Cherokee Nation to all Cherokees who may have been residing out of the

limits of the Nation previous to the adoption of the constitution to return to the Nation and enjoy the rights and privileges of citizenship without being required to memorialize the national council for admission.

Text of Citizenship Acts.

In view of the fact the jurisdiction of the tribunals, which have been created to pass upon its citizenship cases in the Cherokee Nation, has been called in question, in some cases, the text of the acts creating such tribunals will be set forth in full in this opinion. The act conferring jurisdiction upon the Supreme court is as follows:

"That all persons whose rights to citizenship in the Cherokee Nation shall be called in question and who shall be reported by the persons authorized by this act to take a census of the *Cherokee people*, or list of doubtful persons, shall be required to appear before the Supreme Court of the Cherokee Nation, at Tahlequah, on the first Monday in December, 1870, then and there to establish their right to citizenship in the Nation, and the said Supreme Court is hereby specially empowered to act as a court of commissioners on behalf of the Nation, for the hearing and determination of all cases of doubtful citizenship which shall be reported to them by the census takers, or by the solicitors of the several districts. And the decision of the said court shall be deemed final and conclusive in the premises as to the rights of said persons to citizenship in the Cherokee Nation. And the said court shall cause a correct list of the names and ages of all persons whose rights they may confirm; and one of all those whose rights they may reject, to be placed on record in their office, and a copy of the same to be furnished to the Principal Chief for the use of the Executive Department.

"Approved December 3, 1869, the date of presentation."

Counsel for the Cherokee Nation contend that by this act the Supreme Court was not empowered to readmit

persons to citizenship in the Cherokee Nation, and claiming to be citizens were in fact such, and that, if such court went outside of this and admitted persons to citizenship who had come from the adjoining States and had at no time been citizens of the Nation, it exceeded its jurisdiction. This court does not agree with this contention. The authority conferred upon the Supreme Court was to hear and determine the cases of all persons whose rights to citizenship in the Cherokee Nation should be called in question, and who would be reported to the court by the census takers; or, as expressed in another part of the act, "to hear and determine all cases of doubtful citizenship which shall be reported to them by the census takers." The decision of the court, as will be seen, was made final and conclusive in the premises as to the rights of such persons to citizenship in the Cherokee Nation.

The act conferring jurisdiction upon the Chief Justice of the Supreme Court is as follows:

"Whereas, The national council, under a joint resolution approved December 10, 1869, entitled 'A joint resolution of the national council in regard to the *North Carolina Cherokees*,' has invited the said North Carolina Cherokees to emigrate west, and become identified with the Cherokee Nation as citizens thereof; therefore,

Be it enacted by the National Council, That all such Cherokees as may hereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof shall be deemed as Cherokee citizens: *Provided*, Said Cherokees shall enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees. And the said Chief Justice is hereby required to report the number, names, ages, and sex of all persons admitted by him to be entitled to Cherokee citizenship; and also the number, names, ages, and sex of the persons denied the right of citizenship, to the annual session of the national council in each year.

"Approved.

"TAHLEQUAH, C. N., *November 18, 1870.*

The joint resolution to which reference is made is as follows:

"Joint resolution of the National Council in regard to North Carolina Cherokees.

"Whereas, Sundry petitions have been transmitted to the national council, by the North Carolina Cherokees, from which it appears that the said Cherokees (or a portion of them) are desirous of removing and becoming members of the Cherokee Nation;

"And whereas, The Principal Chief has transmitted a communication to the national council enclosing one from the Commissioner of Indian Affairs, from which it appears that the Honorable Commissioner desires to know of the wishes of the Cherokee Nation in reference to the removal of the said North Carolina Indians; therefore

"*Be it resolved by the National Council*, That the Principal Chief be, and he is hereby, authorized to inform the Honorable Commissioner of Indian Affairs of the willingness of the Cherokee Nation to receive the said 'North Carolina Cherokees' into the Cherokee Nation, provided that they remove without any expense to the treasurer of the Cherokee Nation. *And provided further*, That these resolutions shall not be so construed as to admit any Cherokee rights or benefits until they shall have removed west and been identified as citizens of the Cherokee Nation.

"*Be it further resolved*, That the Principal Chief be, and he is hereby, authorized to notify the said 'North Carolina Cherokees' of the willingness of the Cherokee Nation to receive them as citizens of the Cherokee Nation, upon the terms herein before expressed.

TAHLEQUAH, C. N., 10, 1869."

This court has endeavored to secure a copy of the letter of the Commissioner of Indian Affairs, referred to in this act, but has been unable so far to do so. It appears, however, from the two acts mentioned, that they relate to what is known as the North Carolina Cherokees, those Cherokees who are denominated "The Eastern Band of Cherokees" in the decision of the

Supreme Court, reported in 117 United States Reports, p. 288.

All such Cherokees who might thereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof were declared to be Cherokee citizens, provided they should enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees.

It is the opinion of this court that no jurisdiction was conferred upon the Chief Justice of the Supreme Court of the Cherokee Nation, except to enroll North Carolina Cherokees, and if it should appear that he enrolled Cherokees not within this designation, he would be acting without jurisdiction.

The jurisdiction conferred upon the Chief Justice by the act of December 7, 1871, was merely to take evidence with regard to persons applying for citizenship, and transmit the petitions to the council for its final action. The act is not deemed important in this connection, and it will not be quoted. The power of the council to admit persons to citizenship has never been questioned. It is, however, of interest, in order to determine the construction to be given to the act conferring jurisdiction upon the Chief Justice, to refer to a portion of the text of the amendatory act. The amendatory act recites that the act relative to the North Carolina Cherokees, approved November 17, 1870, "is hereby so amended as to require the Chief Justice of the Cherokee Nation to receive and hear the petitions of all persons claiming the right to Cherokee citizenship."

Attention is called to the person covered by each act. By the first act, North Carolina Cherokees are mentioned. By the second act, all persons claiming the rights to Cherokee citizenship are referred to, clearly indicating that the two acts had reference to different classes of persons; that the first act had reference to the North Carolina Cherokees only, while the latter or amendatory act had reference to all persons claiming the rights of Cherokee citizenship.

The act creating the first commission on citizenship, passed December 5, 1877, is as follows:

"The Commission on Citizenship shall have cognizance of, and exercise complete jurisdiction over, all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said Nation as hereinafter specified:

"1st. Of all cases wherein claimants to citizenship have applied to the Supreme Court or the national council, and wherein the court or council have failed to adjudicate the same, whether it originated in the national council or was transmitted thereto for review from the Supreme Court.

"2d. Of all cases where the national council has adjucated the same by a decision adverse to claimants, and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States subsequent to the date of the Cherokee treaty of July 10, 1866, and whose cases have been reported by the United States Agent under instruction from the Department of the Interior to the Principal Chief, and are now on file in this office.

"3d. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where the citizenship has been granted and there is presumptive evidence of fraud having been perpetrated to secure the same; or where citizens of the United States have married into this Nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"5th. Of all cases of persons of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the requirements of the treaty, but has failed to receive recognition as a citizen by competent authority.

"In decreeing the right of citizenship in the Cherokee Nation the commission shall be governed by the provisions contained in the fifth section, amendments to article third of the constitution, to wit: 'All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation; and in addition thereto shall include all applicants *bona-fide* residents and who are of Cherokee parentage, and who may be of not less than the half-blood. The recognition of the rights of citizenship in the Cherokee Nation, by virtue of the foregoing provisions, shall not be deemed as conferring the like right upon any persons not an Indian who may be connected to such person by blood or affinity, unless such person shall comply with the provisions of article 15, chapter 10, New Code, relating to intermarriages.

"The Commissioners on Citizenship may admit as evidence in any of the cases named herein the oral testimony of witnesses under oath, the decision, records, or other papers, or the certified copy thereof in the clerk's office of the national council, or of the Supreme Court of the Cherokee Nation, or by other affidavits taken before any court of record in the United States, duly authenticated, pertaining to any case brought before it under this act, and shall give such weight to the credibility of such evidence in making up their judgment thereon as they may deem it entitled to. They may, in their discretion, limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period of hearing and determining the same."

"Approved December 5, 1877."

This act was amended December 5, 1878, as follows:

"*Be it enacted by the National Council*, That an act approved December 5th, 1877, entitled 'An act creating a

commission on citizenship to try and settle claims to citizenship,' be, and the same is hereby, amended so as to extend the jurisdiction of the Commission on Citizenship to embrace and extend to the cases of all claimants to the rights of citizenship who may at the passage of the act be actually residing within the limits of the Nation, and whose cases have not heretofore been determined adversely to the claimants by the present Commission.

"SEC. 2. *Be it further enacted*, That the Principal Chief be authorized and requested to direct the solicitors of the several districts to report by the 1st day of January, 1879, or as soon thereafter as practicable, to the Commission on Citizenship, the names of all persons who allege that they have claims to Cherokee citizenship and who are now residing within their respective districts.

"SEC. 3. *Be it further enacted*, That the Commission on Citizenship shall expire on the 30th day of June, 1879, and shall then report their proceedings to the Principal Chief, for the information of the national council, and shall turn over to the Executive Department all their records.

"Approved December 5, 1878."

It will be seen that this act embraced all claimants who at the passage of the act actually resided within the limits of the Nation and whose cases had been theretofore determined adversely by said commission.

The act creating a second Commission on Citizenship was passed November 20, 1879, and is as follows:

"They shall also have the right to command the presence and services of the sheriff of Tahlequah District, or his deputy during their sessions; who shall be allowed one dollar per day while attending the sessions of the Commission on Citizenship, separate from his salary. The said sheriff shall have authority to send summons to the several sheriffs of the several districts, to be served without delay by them and returned, without any other compensation than that of their salary.

"The Commission on Citizenship shall have cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee

Nation involving the right to citizenship of said Nation as hereinafter specified.

"1st. Wherein a claimant to citizenship has applied to the late Commission on Citizenship and no final action taken, or to the national council since the expiration of the Commission on Citizenship, or where application for citizenship may be made to the national council prior to the first meeting of the Commission on Citizenship herein created.

"2d. Of all cases where the national council has adjudicated the same by a decision adverse to the claimant, and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of the Interior to the Principal Chief, and are now on file in this office, and which had not been investigated and final decision given by the late Commission on Citizenship.

"3d. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where citizens of the United States have married into this Nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"6th. Of all cases of claimants petitioning for citizenship not embraced in the foregoing classification of claimants.

"7th. Of all the cases of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the treaty but has failed to receive recognition as a citizen by competent authority, and who have not had decisions adverse to them by competent authority.

"In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provi-

sions contained in the 5th section, amendments to article 3 of the constitution. The recognition of the right of citizenship in the Cherokee Nation by virtue of the foregoing provision shall not be deemed as conferring the like right upon any person not an Indian who may be connected with such person by blood or affinity, unless such person shall comply with the provisions of article 15, chapter 10th, 'New Revised Code,' relating to intermarriage."

The third commission, as heretofore stated, was authorized by the council, passed December 8, 1886. The jurisdiction conferred upon it was embraced in section 7 which is as follows:

"SEC. 7. The commission when organized, shall give a hearing to any person applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicant must be a person, or the lineal descendant of a person whose name appears upon the census roll of the Cherokees taken by the United States after the treaty of 1835, and known as the rolls of 1835, and the rolls of 1848, known as the 'Mulley Rolls,' and the census rolls of the Cherokees taken by the United States in 1851, and known as the 'Sila Roll,' and the census rolls of the Cherokees taken by the United States in 1852, known as the 'Chapman Rolls' and the commission shall decide in accordance with the constitution of the Cherokee Nation conferring upon the national council the power to readmit persons to citizenship, and with the decision of the Supreme Court of the United States, delivered March 1st, 1885, in the case of the North Carolina Cherokees *v.* The Cherokee Nation."

This act was amended May 23, 1887, as follows:

"An act to amend an act entitled 'An act for the appointment of a commission to try and determine applicants for Cherokee citizenship.

Be it enacted by the National Council, That section seven (7) of an act of the national council approved December 8, 1886, and entitled an act for the providing

for the appointment of a commission to try and determine applications for Cherokee citizenship, shall be so amended that the commission shall be authorized to try and determine all claims to Cherokee citizenship wherein the claimants claim by virtue of Cherokee descent, who left or emigrated from the Cherokee Nation prior to the year 1835."

This amendment conferred jurisdiction to hear and determine the claims of those who emigrated from the Old Cherokee Nation prior to the year 1835. Such persons were known as the Old Settlers or Western Cherokees. As before stated, this commission expired in 1889. Since that time no commission or tribunal of the Cherokee Nation has been authorized to pass upon citizenship cases. All persons admitted to citizenship in the Cherokee Nation since that time have been admitted by act of the Cherokee council. An act of the Cherokee council of December 5, 1888, passed during the existence of this commission, provided that all persons admitted by the commission should become bona-fide residents of the Nation within one year from the date of their admission. The last act of the Cherokee council of general legislation in regard to citizenship is as follows:

"*Be it enacted by the National Council*, That all persons that have been or may hereafter be readmitted to citizenship in the Cherokee Nation are hereby required to permanently locate within the limits of the Cherokee Nation within six months from the passage of this act, or from the date of readmission of persons readmitted or no rights whatever shall accrue to such persons by reason of such readmission;

"*Provided*, That nothing in the act shall bar minors and orphans.

"Approved December 4th, 1894."

Adjudication in Citizenship Cases.

In all cases wherein it appears that the applicants for citizenship in the Cherokee Nation filed their claims before the proper tribunal or commission, and in all cases where the tribunal or commission acted within the

scope of its jurisdiction, as prescribed by the law of the Cherokee Nation, and admitted such persons to citizenship, this court will regard such cases as adjudicated; and in all cases where such applicants were rejected, the same rule will be applied. In order to set aside such adjudication, whether in favor of or against such applicants, it must be made to appear to this court either that the tribunal or commission acted without jurisdiction, or that the decision of the commission was secured by fraud. A judgment by which the court exercised a power not conferred upon it by the statute under which it assumed to act is a nullity, and will be so treated when it comes in question, either directly or by an appeal or collaterally.

Allison *v.* T. A. Snider Preserve Co. (Sup. Ct., App. Term), 20 Misc., 367; 45 N. Y. Supp., 925.
Risley *v.* Bank, 83 N. Y., 318.

In order that the adjudication of the tribunal or commission should be set aside for fraud, it must clearly and affirmatively appear that the case was fictitious; that the judgment of the tribunal was procured by the beneficiaries thereof by bribery or other corrupt means, and that the judgment should not in equity and good conscience be regarded as a valid judgment.

Justice requires that every case having been once fairly and impartially tried should be forever closed; the public tranquility demands that all litigations of that kind between those parties should cease. A judgment entitled to this consideration must, however, be the judgment of the tribunal.

"The rule is well settled that a judgment or decree of any court will be set aside in a court of equity if it be made to appear that it was procured by fraud. This rule needs no citation of authorities to support it, because it is too well established and known to need such citation. But the proof of the fraud and the facts evidencing it must be clear and satisfactory to the court before it will act. It will not proceed upon doubtful inferences."

Davis *against* Jackson, 39 S. W. Rep., p. 1076; Sup. Ct. of Tenn., March 13, 1897.

It is not enough to allege and prove that the tribunal erred in his opinion; or that the perjured testimony was introduced and considered, unless such perjured testimony was given by the beneficiaries of the judgment, or by their procurement. (Black on Judgments, vol. 1, sec. 323.) It will be taken for granted that the court or tribunal fairly weighed and considered such testimony and disregarded it. The judgment itself must be corrupt, or procured by corrupt means, or the court must have acted without jurisdiction, in order to render it a nullity.

In all cases where claimants have appeared before tribunals or commissions established by the Cherokee Nation, and have had their cases considered fairly and honestly, this court will not disturb the judgment. The burden of proof will be upon those who allege a fraudulent judgment to prove it. The law presumes not only that the acts of courts, but the transactions of individuals are honest. Those who allege fraud are required to establish it conclusively.

> Black on Judgments, vol. 1, sec. 321, and authorities there cited, namely, Jones *v.* Britton, 1 Woods, 667; Caldwell *v.* Fifield, 24 N. J. Law, 150.

In all cases where the tribunal or commission having jurisdiction of the case has passed upon it, the decision will be binding upon this court, unless it clearly appears from the evidence in the case that the judgment is so fraudulent that a court of competent jurisdiction should set it aside and declare it a nullity.

Indians Residing in the States.

Frequent reference has been made in the briefs and arguments of counsel in citizenship cases to the case of John Elk *v.* Charles Wilkins, decided by the Supreme Court of the United States, and reported in 112 U. S. Reports, pp. 94 to 123. The plaintiff in this case brought suit against the defendant, who was one of the registrars of election in the city of Omaha, Nebraska, for refusing to register him as a voter, and for refusing to permit him to

vote at an election in that city in April, 1880. The defendant refused to register and to permit the plaintiff to vote on the ground that he was an Indian, and not a citizen of the United States. In that case the Supreme Court of the United States held as follows:

"An Indian, born a member of one of the Indian tribes within the United States which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized or taxed, or recognized as a citizen, either by the United States or the State, is not a citizen of the United States within the meaning of the first section of the 14th article of the amendment of the Constitution."

It will be seen from this quotation from the syllabus in that case that an Indian who had separated himself from his tribe, but who had not been naturalized or taxed, or recognized as a citizen, either by the United States or State, is not a citizen of the United States. The court, further on in its opinion in this case, held as follows:

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as choose to remain behind on the removal of the tribe westward, to be citizens, or authorized individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws."

Reference is had, it will be seen from these quotations from the decision of the Supreme Court, to the treaties with the Cherokees in 1817 and 1835. The treaty with the Cherokees in 1817, article 8, provides as follows:

"And to each and every head of any Indian family residing on the east side of the Mississippi River on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with reversion in fee simple to their children, reserving to the widow her dower, the registry of whose names is to be filed in the office of the Cherokee Agent, which shall be kept open until census is taken as stipulated in the third article of this treaty: *Provided*, That if any of the heads of families for whom reservation may be made should remove therefrom then, in that case, the right to revert to the United States."

The treaty of 1835, referred to in the decision of the Supreme Court, article 12, contains this provision:

"Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and property, shall be entitled to receive their due proportion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita as soon as an appropriation is made for this treaty."

There was an additional provision allowing the Indians referred to in that article to have a pre-emption right to 160 acres of land to be given to those who were desirous to reside within the States of North Carolina, Tennessee, and Alabama. A supplemental treaty to this, proclaimed May 23, 1836, relinquished and declared void the pre-emption rights and reservation provided for in the treaty of 1835.

These two articles, however, in the treaties of 1817 and 1835 clearly indicate the intention of Congress that such Cherokee Indians as were averse to removal to the country west of the Mississippi might become citizens of the States where they resided.

In the case of the United States *v.* Boyd *et al.*, decided by the Circuit Court of the United States for the Western District of North Carolina, in June 1895 (68 Federal Reporter, pp. 577–585), it was held that "the Indians belonging to the Eastern Band of Cherokees in the State of North Carolina have never become citizens of the United States, and the Federal courts have jurisdiction to entertain a suit brought by the United States, as guardian of such Indians, for the protection of their interests.

In the opinion of the Circuit Court of the United States in this case, the court used this language:

"By the treaty of New Echota (treaty of 1835) the individuals and families who were averse to removal with the Nation were suffered to remain in the States in which they were living, if they were qualified to take care of themselves and property and were desirous of becoming citizens of the United States. Those who exercised these privileges terminated their connection with the Cherokee Nation."

Eastern Band of Cherokee Indians *v.* United States, 117 U. S., 288; 6 Sup. Ct., 718.

Did this make them citizens of the United States? The Circuit Court here quotes with approval the decision of the Supreme Court in the case of Elks *v.* Wilkins (*supra*), and then continues as follows:

"There is nothing in the record going to show that these Indians (Eastern Band of Cherokees) were ever naturalized. Have they been made citizens by treaty?"

Article 12 of the treaty of 1835 is then quoted by the Circuit Court, and its opinion continues as follows:

"This does not confer on them citizenship. It only authorized them to become citizens when it is recognized that they are qualified or calculated to become useful citizens."

The court then pointed out that they could only

become citizens of the United States by naturalization. The court continued as follows:

"But it must not be understood that these Cherokee Indians although not citizens of the United States, and still under pupilage, are independent of the State of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are in daily contact with her people. They are not a nation or a tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian reservations apply to them. All that is decided is, that the Government of the United States has not yet ceased its guardian care over them nor released them from pupilage."

It was also conceded in this opinion that the North Carolina Cherokees were recognized citizens of the State of North Carolina. That they voted, paid taxes, worked roads and performed all the duties of said State. The Circuit Court, in the case above referred to, in its opinion further states as follows:

"The case of the Cherokee Trust Fund (117 U. S., 288; 6 Sup. Ct., 718) does not conflict with these views. That case decides that this Eastern Band of Cherokee Indians is not a part of the Nation of Cherokees with which this Government treats, and that they have no recognized separate political existence; and at the same time their distinct unity is recognized, and the fostering care of the Government over them as such distinct unit."

It is clearly held in this opinion of the Circuit Court of North Carolina that the Eastern Band of Cherokees is not a part of the Cherokee Nation as now constituted. And if the Eastern Band Cherokees which have preserved a distinct tribal organization under the tutelage of the United States, is not a part of the Cherokee Nation as now constituted, it follows even with greater force that those Indians who removed their effects out of the old Cherokee Nation before the removal of its citizens west of the Mississippi River, as well as those who removed from the limits of the Nation as now constituted

and become citizens of any other government, have forfeited all their rights and privileges as citizens of the Cherokee Nation.

The decision of the Supreme Court in the case of Elk *v.* Wilkins (*supra*) was handed down November 3, 1884. A little over two years thereafter Congress passed an act, February 8, 1887 (24 Stat. at Large, 388), with the evident purpose to define the status of Indians situated as was Elk, the plaintiff in the case.

This act declares an Indian, who has taken up his residence in the United States, separate and apart from his tribe, and who has adopted the habits of civilized life, to be a citizen of the United States, and entitled to all the rights, privileges, and immunities of other citizens thereof; and that such citizenship is conferred "without in any manner impairing or otherwise affecting the right of such citizen to tribal or other property." This act of Congress is important in determining the status of Cherokee Indians who have taken up a residence in the States, separate and apart from the tribe, and have adopted the habits of civilized life. Such Indians were declared, February 8, 1887, to be citizens of the United States. And those Indians who have never been recognized as members of the Cherokee Nation, as it is now constituted, have never had any right to tribal property in said Nation, and hence they have no rights in the Nation which could in any manner be impaired or otherwise affected by being declared citizens of the United States. If such Indians have any tribal rights to be impaired, they were rights in the old Cherokee Nation or in the Eastern Band of Cherokee Indians, now located as a separate tribe in North Carolina. If there are any Cherokees who have ever been recognized as citizens of the Cherokee Nation as now constituted, who have separated themselves from the Nation, and taken up their residence in the States, and have removed their effects out of the Nation, they would, by the act of Congress of February 8, 1887, be citizens of the United States, and by the constitution and laws of the Cherokee Nation they would have forfeited their rights as citizens of the Nation. The Cherokee constitution and laws were not abrogated or repealed by the act of

Congress of February 8, 1887, for the reason that the United States has ceded to the Cherokee Nation the right to determine who shall be citizens thereof.

A careful examination of the treaties which have been made with the Cherokee Nation by the United States will clearly establish the fact that nowhere does it appear that Cherokee Indians who have separated themselves from the tribe or taken up their residence in the States are taken into consideration, except the provisions in reference to the Eastern Band of Cherokees, and those in reference to Cherokees who accepted reservation of land under article 8 of the treaty of 1817, and those who received their due proportion of all personal benefits accruing under the treaty of 1835, article 12. The treaties in reference to those classes of Cherokee Indians recognized the fact that they had separated themselves from and ceased to constitute a part of the Cherokee Nation. And, as is held by the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation (*supra*), these Indians "ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the States in which they resided." And further, if Cherokee Indians who have separated themselves from the Cherokee Nation, and have taken up their residence in any of the States of the Union, wish to enjoy the benefits of citizenship in the Cherokee Nation, they must comply with the constitution and laws of the Cherokee Nation, and be readmitted to citizenship as therein provided. They can not live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation."

By the terms of various treaties between the United States and the Cherokee Nation, during the time the Nation was divided into the Eastern and Western tribes, the annuities were divided between the two branches of the Nation, according to their respective members, to be ascertained by a census to be taken. The annuities thus divided were regularly paid as stipulated until commuted by the treaty of 1835. This clearly shows that the United States regarded those Cherokees

only who were citizens of the Nation as entitled to annuities and as having any right or interest in Cherokee lands or property.

Purchase of the Cherokee Outlet.

Counsel for the Cherokee Nation contend that the treaty with the Cherokee Nation for the purchase of what is known as "The Cherokee Outlet" expressly recognized the right of the Cherokee Nation to determine for itself who were entitled to citizenship. It is true that two considerations were expressed in the treaty: One of money, and the other in reference to intruders. Article one of the treaty ceded the lands in the Cherokee Outlet to the United States.

Article two is as follows:

"For and in consideration of the above cession and relinquishment the United States agrees:

"FIRST. That all persons now residing, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation or not in the employment of citizens of the Cherokee Nation, in conformity of the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not residents in the Cherokee Nation under the provisions of treaty or act of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of the treaty of 1835 and sections 26 and 27 of the treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said Nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation."

Counsel for the Cherokee Nation contend that the foregoing provision was deemed a greater consideration to the Cherokees than the money actually paid them, and that the legislation contained in act of June 10, 1896, conferring upon the United States commission and this

court authority to determine who were citizens of the Cherokee Nation is in violation of the letter and spirit of this treaty and impairs the obligation of the contract of purchase; that contracts made by the Government with individuals are binding upon the Government, and that the Government is subject to the same obligations as individuals.

If it should be conceded, for the sake of argument, that this position is correct, the conclusion would follow that the contract for the purchase of the Outlet had been impaired by subsequent legislation, and that a portion of the consideration of purchase had failed. In that event, if this position be well taken, the Cherokee Nation might demand additional pecuniary consideration for the sale of the Outlet, the amount to depend upon the damages, if any, which the Cherokee Nation had sustained. It would not follow, in any event, that the United States had no power to enact the legislation conferring authority upon the United States commission to prepare rolls, and the jurisdiction upon this court under which citizenship ceases are now being heard and determined.

Power of Congress Over Indians.

In the first treaty made between the United States and the Cherokee Nation, which was concluded November 22, 1785, at Hopewell, on the Keowee, it was expressly provided in article 3, as follows:

"That said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whomsoever."

And by article 9 of said treaty it was provided as follows:

"For the benefit and comfort of the Indians, and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians and managing all their

affairs in such a manner as they (the United States in Congress assembled) think proper."

These provisions have never been abrogated, and the power has always been preserved in Congress of managing all the affairs of the Cherokees in such manner as Congress should think proper.

During the Revolutionary War the Cherokees had adhered to Great Britian, and this first treaty with them provided for a general exchange of prisoners; and the 13th, or concluding article, was as follows: "The hatchet shall be forever buried, and the peace given by the United States and friendship re-established between the said States on one part and all the Cherokees on the other shall be universal." This evidently explains the reasons which induced the United States to incorporate in this treaty the foregoing provisions.

It is true that for many years the United States pursued a policy of making treaties with the Indian nations and tribes, but that policy did not recognize the Indian tribes or nations as independent sovereignties. Their dependence upon and subjection to the authorities of the United States have always been conceded. Congress may in its discretion legislate for them and concerning them in such manner as Congress may deem proper, subject only to the Constitution of the United States.

Summary.

This court will now proceed to consider the cases before it on appeal from the United States commission, in reference to citizenship in the Cherokee Nation. A separate opinion will be submitted later on in the term in reference to citizenship in the Creek Nation.

In determining who are citizens of the Cherokee Nation, the following propositions will govern this court:

FIRST. That those Indians who have separated themselves from the present Cherokee Nation, or from the old Cherokee Nation east of the Mississippi River, and have taken up their residence in the States, and have moved their effects out of the limits of the Nation, and

the Eastern Band of Cherokee Indians, who remained in the States after the treaty of 1835, have forfeited all their rights and privileges as citizens of the Nation, and that such persons can not regain their citizenship unless they comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided.

SECOND. That this court recognizes the legislation of the Cherokee Nation constituting the Supreme Court, and thereafter the Chief Justice of the Supreme Court tribunals to pass upon certain classes of citizenship cases, and also the legislation of the Cherokee Nation creating commissions with prescribed powers to pass upon applications for citizenship in the Cherokee Nation, as passed in accordance with the general legislative power of the Nation, and will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Cherokee Nation. In construing such legislation the court will apply to it the same general principles of statutory construction which should be applied to the statutes of any of the States of the Union or to the statutes of the United States.

THIRD. That blood alone is not the test of citizenship in the Cherokee Nation. That those Cherokees, and their descendants, who have separated themselves from the Nation, and have removed their effects from it and taken up their residence in any of the States of the Union have ceased to be citizens of the Cherokee Nation.

And further, that bona-fide residence in the Nation is essential to citizenship.

FOURTH. Full faith and credit will be given to the judgments of tribunals and commissions in citizenship cases, unless it is made to appear that the tribunal or commission acted without jurisdiction, or that its judgment was procured by fraud, as more fully explained in this opinion. The acts of the Cherokee council in the determination of applications for citizenship in the Nation will be regarded as judgments of a court and will be subject to the same tests as to their validity.

UNITED STATES OF AMERICA.

Indian Territory, Northern District.

I, William M. Springer, Judge of the United States Court for the Northern District of Indian Territory, do hereby certify that the within and foregoing is a true and perfect copy of my General Opinion delivered on December 3d, 1897, on the question of Citizenship in the Cherokee Tribe or Nation of Indians, as the same appears to me from the original opinion now in my custody.

Witness my hand on this 1st day of December, A. D. 1898.

WM. M. SPRINGER,
United States Judge aforesaid.